TABLE OF CONTENTS — APPENDIX

	Page
Opinion of the Court of Appeals for the Third Circuit, sitting *in banc*, dated July 31, 1996	1a
Judgment of the Court of Appeals for the Third Circuit, sitting *in banc*, dated July 31, 1996	39a
Transcript of Oral Argument before the Third Circuit, sitting *in banc*, dated May 14, 1996	41a
Order of the Court of Appeals for the Third Circuit, dated March 27, 1996, granting rehearing *in banc*	74a
Opinion of the Court of Appeals for the Third Circuit, dated February 7, 1996 (the Panel's Opinion)	75a
Order of the District Court, dated September 16, 1994, denying Petitioners' motion for rehearing	101a
Memorandum Opinion and Order of the District Court, dated December 30, 1993, dismissing Petitioners' appeal as moot	104a
Memorandum Opinion and Order of the Bankruptcy Court, dated April 16, 1993, denying Petitioners' renewed motion for adequate protection	110a
Order of the Bankruptcy Court, dated April 16, 1993, confirming Continental's Plan of Reorganization	122a
Memorandum Opinion and Order of the Bankruptcy Court, dated August 27, 1992, denying Petitioners' original motion for adequate protection	187a

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 94-7748

IN RE CONTINENTAL AIRLINES:

NATIONSBANK OF TENNESSEE, N.A., f/k/a NationsBank of Tennessee, as Collateral Trustee under a Secured Equipment Indenture and Lease Agreement dated March 15, 1987 ("NationsBank"); NEW JERSEY NATIONAL BANK, as successor by merger to Constellation Bank, N.A., f/k/a National State Bank of Elizabeth, N.J.; HARRIS TRUST AND SAVINGS BANK; and BOATMAN'S FIRST NATIONAL BANK OF OKLAHOMA, as First, Second and Third Priority Secured Equipment Certificates Trustees thereunder, respectively (the "Series Trustees" and, collectively with NationsBank, the "Trustees"),

Appellants

On Appeal from the United States District Court
for the District of Delaware
C.A. No. 93-195-JJF
(Bankruptcy Nos. 90-932 through 90-984)

Argued September 15, 1995

Before: SLOVITER, *Chief Judge*
ALITO and SEITZ, *Circuit Judges*

Reargued in banc May 14, 1996

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, LEWIS, MCKEE, SAROKIN and SEITZ, *Circuit Judges*

(Filed July 31, 1996)

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OPINION OF THE COURT

SLOVITER, *Chief Judge.*

INTRODUCTION

Before the in banc court is an appeal by NationsBank of Tennessee (Collateral Trustee) and New Jersey National Bank, Harris Trust and Savings Bank, and Boatman's First National Bank of Oklahoma (First, Second, and Third Priority Secured Equipment Certificate Trustees), who are collectively referred to in this opinion as the "Trustees," from the order entered by the district court in the Chapter 11 bankruptcy proceeding of Continental Airlines, Inc. dismissing as "moot" three appeals by the Trustees. Those appeals were from orders of the bankruptcy court which 1) denied the Trustees' Renewed Motion for adequate protection, 2) confirmed Continental's revised second amended joint plan of reorganization, and 3) denied the Trustees' motion for the establishment of a cash deposit of $123,479,287. In essence, the Appellant Trustees seek payment for an asserted administrative claim of approximately $117 million against the reorganized company. The Appellee, Continental Airlines, Inc., defends the district court's decision to dismiss the Trustees' appeal and argues, in the alternative, that the underlying rulings of the bankruptcy court were correct as a matter of law and fact.

I.

FACTUAL AND PROCEDURAL HISTORY

Continental filed its Chapter 11 bankruptcy petition on December 3, 1990. Appellant Trustees serve as successor Collateral and Series Trustees for certificate holders who had provided Continental with operating capital. The certificates were secured at the time of Continental's petition by a pool of 29 commercial aircraft with engines, and 81 additional jet engines which, we were advised, serviced about one-third of Continental's operating fleet. Under the Bankruptcy Code, the debtor in possession, which has most of the rights, powers, functions and duties of a trustee, *see* 11 U.S.C. § 1107(a),

"may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1).

Section 363(e) provides:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used . . . by the [debtor in possession], the court, with or without a hearing, shall prohibit or condition such use . . . as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e).

On February 21, 1991, First Fidelity Bank of New Jersey, predecessor to NationsBank as Collateral Trustee, filed a motion along with many other aircraft lessors and financiers alleging, *inter alia,* a decline in the value of the collateral and seeking adequate protection under section 363(e). First Fidelity later withdrew from this motion, but on June 28, 1991 it, and the predecessors of the other Appellant Trustees, filed a motion seeking similar relief. The bankruptcy court held an evidentiary hearing on the motion from September 3 through September 6, 1991 limited to the Trustees' assertion that they were entitled to adequate protection payments as a result of the collateral's post-petition decline in market value.

Continental argued, *inter alia,* that because the Trustees had not filed a motion for relief from the automatic stay, they were not entitled to an award of adequate protection under section 363(e). The motion remained pending in the bankruptcy court until August 27, 1992 when the court ruled on the Trustees' motion, rejecting Continental's legal argument but finding as a fact, based on the "Blue Books," a publication issued by a company that appraises aircraft, that the market value of the collateral had not declined during the period at issue in the motion. *In re Continental Airlines, Inc.*, 146 B.R. 536 (Bankr. D. Del. 1992) [hereinafter *Continental I*].

Approximately two weeks before the bankruptcy court issued that opinion, the Trustees filed their first motion under section 362(d) of the Bankruptcy Code to lift the automatic

stay ("Lift-Stay Motion"). *See* 11 U.S.C. § 362(d). This section permits a creditor to move for relief from the automatic stay of delineated activities, such as repossession of collateral, effected by section 362(a) of the Bankruptcy Code.

On September 14, 1992, the Trustees also filed a renewed motion for adequate protection for alleged decline in the collateral's value for the period after September 1991, when the original 1991 motion was argued ("Renewed Motion"). There were various hearings on the Renewed Motion between November 3, 1992 and February 5, 1993. Toward the end of that period, the Trustees filed a motion dated January 29, 1993, asking the bankruptcy court to establish a cash deposit of some $123 million, of which $117 million was attributable to alleged market decline, to preserve what the Trustees claimed was the administrative priority status of the Trustees' adequate protection claim if Continental emerged from bankruptcy as a reorganized debtor ("Deposit Motion").

During this period efforts to reorganize the debtor continued. On November 9, 1992 Continental entered into an Investment Agreement under which the Investors (Air Partners, L.P. and Air Canada) agreed and committed to an investment of $450 million in the reorganized entity under a complex arrangement and subject to certain conditions. App. at 391 *et seq.* One of those conditions, and the one most relevant to this proceeding, was a limitation on the amount and nature of liabilities and administrative expense claims required to be assumed by or attributable to the reorganized company. App. at 408. On January 13, 1993 Continental filed a second amended joint plan of reorganization ("Plan") which referenced that Investment Agreement. The Plan provided, *inter alia,* for assumption of "allowed administrative claims" by the reorganized Continental. App. at 656.

The confirmation hearing was held for a number of days during the period March 16, 1993 through April 16, 1993. The parties reached a settlement on April 12 concerning adequate protection due to use and/or maintenance of the collateral by Continental, and no issue relating to use decline (the

impairment in value attributable to the use of the collateral by the debtor in possession) is before us. However, the parties did not settle the Trustees' adequate protection claims based on decline in market value.

At the conclusion of the confirmation hearing on April 16, 1993, the bankruptcy court denied the Deposit Motion and the Renewed Motion. In a published opinion, the bankruptcy court held that it was necessary for the Trustees to have sought relief from the automatic stay to be entitled to adequate protection for market value decline; that therefore the Trustees were not entitled to adequate protection due to market decline until after the date of their Lift-Stay Motion, i.e. August 14, 1992; and that no decline in the market value of the collateral had taken place since that date. *In re Continental Airlines, Inc.*, 154 B.R. 176 (Bankr. D. Del. 1993) [hereinafter *Continental II*]. Also on April 16, 1993, the bankruptcy court signed the Confirmation Order. The court made a series of detailed findings of fact and conclusions of law underlying the Confirmation Order which will be referred to throughout this opinion when pertinent.

On April 20, 1993 the Trustees filed three notices of appeal to the district count from the bankruptcy court's denial of the Renewed Motion for Adequate Protection, its denial of the Deposit Motion, and its order confirming the Plan. Two days later, the Trustees filed a motion for a partial stay of the consummation of the Plan ("Conditional Stay Motion"), but filed that motion in the district court, which referred them to the bankruptcy court. On April 26, 1993, the Trustees filed that stay request in the bankruptcy court. Because the bankruptcy judge was not available, the hearing on the motion was held the next day in the district court, which stated, without explanation or analysis, that the Trustees were likely to prevail on their appeal to the district court, but denied the stay because the Trustees were "unable to post a bond satisfactory to the Court." App. at 1755-56. The Trustees did not then make any effort to seek any emergency relief from this court. With no stay impeding implementation of the Plan which had now

been confirmed, the Investors proceeded to close the transaction by making their promised investment.

On May 6, 1993 Continental filed a motion in the district court to dismiss the Trustees' appeals as moot, which the district court granted on December 30, 1993. The Trustees filed a motion for rehearing and reconsideration in light of the decision in *Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993) [hereinafter *Chateaugay II*], which the court denied. The Trustees then filed a timely notice of appeal. This court has jurisdiction pursuant to 28 U.S.C. § 158(d).

A panel of this court heard argument on September 15, 1995 and issued an opinion that affirmed the district court's order by a two-to-one vote. The Trustees petitioned for rehearing, and the in banc court voted to rehear the appeal. Under this court's Internal Operating Procedures, the opinion of the panel issued February 7, 1996 was withdrawn.

II.

DISCUSSION

This court has not addressed the interesting and challenging questions raised by the bankruptcy court's holding that a creditor must file a motion to lift the automatic stay as a prerequisite to seeking adequate protection. The Trustees argue that the bankruptcy court erred as a matter of law and that this court can decide the issue de novo even though it was not reached by the district court. They further argue that the bankruptcy court's finding that there was no diminution in the market value of the Trustees' collateral after they filed their Lift-Stay Motion was clearly erroneous. Finally, they argue that the bankruptcy court erred as a matter of law in denying their motion for the establishment of a cash deposit.

Not surprisingly, Continental, as appellee, defends both the bankruptcy court's legal determination that the Trustees could not assert adequate protection claims for alleged market value decline during the period before they moved for relief from the automatic stay and its factual conclusion that there had

been no substantial decline in the value of the collateral since the Lift-Stay Motion was filed. Finally, it argues that in any event the Trustees could not recover for adequate protection because the value of the collateral did not decline below its value on the petition date, which Continental contends is the relevant measure.

We would reach these issues only if we were satisfied that the district court erred in holding that the Trustees' appeals to it were "moot," a decision as to which the parties vigorously disagree. Mootness *vel non* of the appeals before the district court is closely related to, if not indistinguishable from, the question whether the appeal to this court is moot, an issue which Continental alludes to in its brief. For convenience, we will refer to mootness in the district court unless we state otherwise.

Continental does not contend that the appeals to the district court or to us were moot in the constitutional sense, implicating the case or controversy requirement of Article III, § 1. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975). This is not a situation analogous to those where the Supreme Court determined that the appeals became moot because the law at issue was repealed, *see Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414-15 (1972); the subject of the election campaign controversy was no longer a candidate, *see Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969); or the railroad whose application for tariffs was contested withdrew that application, *see A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329-30 (1961).

Indeed, as the Supreme Court has recently explained, an appeal is moot in the constitutional sense only if events have taken place during the pendency of the appeal that make it "impossible for the court to grant 'any effectual relief whatever.'" *Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 449 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). An appeal is not moot "merely because a court cannot restore the parties to the *status quo ante*. Rather, when a court can fashion '*some* form of meaningful

relief,' even if it only partially redresses the grievances of the prevailing party, the appeal is not moot." *RTC v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 560 (3d Cir. 1994) (in banc) (quoting *Church of Scientology*, 113 S. Ct. at 450). Thus, in *Isidor Paiewonsky Associates v. Sharp Properties, Inc.*, 998 F.2d 145, 152 (3d Cir. 1993), we concluded that because we could impose at least one of the remedies enumerated by the appellant, and thereby provide it "*some* effective relief," the appeal was not moot. *See also Swedeland*, 16 F.3d at 559-60. That is not the issue in this case.

Instead, Continental invokes the broader interpretation of mootness applied in bankruptcy cases, often referred to as "equitable mootness." *See, e.g, Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038-39 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048 (7th Cir. 1993); *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993) [hereinafter *Chateaugay I*]; *Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co.)*, 963 F.2d 469, 471-72 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992); *First Union Real Estate Equity & Mortgage Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992); *Central States Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 95-96 (4th Cir. 1988); *In re AOV Indus.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986); *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 796-97 (9th Cir. 1981).[1] Under this widely recognized and

[1] Because the doctrine often called "equitable mootness" is well accepted, there is little discussion in the case law of its historical basis. The dissent attempts to trace it from a provision of former Bankruptcy Rule 805, which concerned stays pending appeal, to *Roberts Farms*, 652 F.2d 793 (9th Cir. 1981). But the *Roberts Farms* court noted that the amendment to Rule 805 that made explicit the requirement to obtain a stay in order to effectively challenge an order approving a sale to a good faith purchaser was simply a codification of existing case law. *See id. at* 796 (citing *A&H*

(Footnote continued)

accepted doctrine, the courts have held that "[a]n appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Chateaugay I,* 988 F.2d at 325.

The use of the word "mootness" as a shortcut for a court's decision that the *fait accompli* of a plan confirmation should preclude further judicial proceedings has led to unfortunate confusion. In a trenchant discussion of the issue in a recent decision of the Seventh Circuit, the court noted that denominating the doctrine as "equitable mootness" is misleading. *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, 115 S. Ct. 509 (1994). Judge Easterbrook, writing for the court, stated: "[t]here is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness'). Using one word for two different concepts breeds confusion." *Id.* (emphasis in original). Thus, although the discussions and applications of the concept of "mootness" in bankruptcy cases by that court had previously encompassed what is referred to elsewhere as "equitable mootness," *see Specialty Equip.*, 3 F.3d at 1048; *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992), the court in

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Holding Corp. v. O'Donnell (In re Abingdon Realty Corp.), 530 F.2d 588, 590 (4th Cir. 1976), which in turn cited the Advisory Committee's Note to the proposed amendment which so stated).

Further, *Roberts Farms* made clear that the consideration of equitable factors was an "entirely separate and independent ground for dismissal." 652 F.2d at 798. The court stated that "Appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court and have permitted such a comprehensive change of circumstances to occur as to render it *inequitable* for this court to consider the merits of the appeal." *Id.* (emphasis added). *Roberts Farms* characterized as the "touchstone precedent for this principle" the earlier decision in *Valley National Bank of Arizona v. Trustee*, 609 F.2d 1274 (9th Cir. 1979), where it "held that the failure to seek stays coupled with a substantial change of circumstances would justify dismissal of the appeal for lack of equity." *Roberts Farms*, 652 F.2d at 798. Thus the dissent errs in suggesting that later cases considering equitable factors represented "a quite substantial extension" to the doctrine enunciated and applied in *Roberts Farms*.

UNR Industries stated it would now "banish 'equitable mootness' from the (local) lexicon." 20 F.3d at 769. Instead, the court continued, "[w]e ask not whether this case is moot, 'equitably' or otherwise, but whether it is prudent to upset the plan of reorganization at this late date." *Id.*

These "equitable" or "prudential" considerations focus on "concerns unique to bankruptcy proceedings." *Manges,* 29 F.3d at 1038. It is evident that "equitable mootness" is an inapt description of the doctrine at issue here. Nonetheless, since past cases have used that term, we use it in discussing them. Therefore, it does not further consideration of this appeal to argue, as the dissent does, that we have "fallen into the trap" of confusing these considerations with Article III mootness. Whether termed "equitable mootness" or a prudence doctrine, we see no reason why the Third Circuit should part company with our sister circuits in their adoption of this doctrine. If limited in scope and cautiously applied, this doctrine provides a vehicle whereby the court can prevent substantial harm to numerous parties.

The Trustees have not challenged the viability of the doctrine of equitable mootness or application of prudential considerations in bankruptcy cases, nor have they cited to a case in any circuit that rejects the concept. Instead, they rely most heavily on a decision of the Second Circuit holding that even though the reorganization plan for the bankrupt LTV Corporation had been confirmed, the appeal of tax lessors challenging the plan's failure to give their claims administrative priority was not moot. See *Chateaugay II,* 10 F.3d 944 (2d Cir. 1993). Significantly, the court in *Chateaugay II* did not quarrel with the doctrine, merely its application in that case. In fact, in *RTC v. Best Products Co. (In re Best Products Co.)*, 68 F.3d 26, 29 (2d Cir. 1995), a more recent case from the Second Circuit, the court once again emphasized the language in *Chateaugay I* that even though an appeal may not be moot in the sense of Article III of the Constitution, it may be deemed moot in bankruptcy cases because of "equitable considerations."

We have generally stated that we exercise plenary review of a district court's decision on mootness. *See Swedeland,* 16 F.3d at 559; *Northeast Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 61 (3d Cir. 1991); *International Bhd. of Boilermakers v. Kelly*, 815 F.2d 912, 914 (3d Cir. 1987). However, none of those cases involved a determination, like the one we review here, that an appeal following a consummated bankruptcy reorganization should be dismissed for equitable and prudential reasons even though some effective relief is available. Surprisingly, we have seen little more than a few cursory references to the standard of review in the cases from other circuits applying this doctrine. *See AOV Indus.*, 792 F.2d at 1148 (district court's power to dismiss appeal as moot "discretionary"); *Club Assocs.*, 956 F.2d at 1069 (legal determinations reviewed de novo, bankruptcy court's factual findings reviewed for clear error).

Because the mootness determination we review here involves a discretionary balancing of equitable and prudential factors rather than the limits of the federal courts' authority under Article III, using ordinary review principles we review that decision generally for abuse of discretion. *Cf. General Glass Indus. Corp. v. Monsour Medical Found.*, 973 F.2d 197, 200 (3d Cir. 1992) (abstention determination reviewed under abuse of discretion standard); *Bermuda Express, N.V. v. M/V Litsa*, 872 F.2d 554, 557 (3d Cir.) (balancing of equities involved in application of laches doctrine reviewed for abuse of discretion), *cert. denied*, 493 U.S. 819 (1989); *Bennett v. White*, 865 F.2d 1395, 1402 (3d Cir.) (scope of a remedial order reviewed for abuse of discretion), *cert. denied*, 492 U.S. 920 (1989); *Evans v. Buchanan*, 555 F.2d 373, 378-79 (3d Cir.) (in banc) (same), *cert. denied,* 434 U.S. 880 (1977). A particular case may also raise legal and/or factual issues interspersed with the prudential ones, and then the applicable review standard, plenary or clearly erroneous, will apply.

The dissent argues that the cases cited above are inapposite because the district court acted as an appellate court and that we should therefore use plenary review. However, the proposition that when an appellate court reviews a lower

court's balancing of prudential factors, it does so under an abuse of discretion standard as long as the factors considered are not inappropriate as a matter of law is a general one applicable in all fields, not excluding bankruptcy. As the Fifth Circuit noted in a bankruptcy case:

> In this particular case, we are reviewing the decision of the district court in its capacity as an appellate court. Several different standards of review govern our decision, depending on the nature of the holdings reviewed. Where the disputed holding involves a matter that is within the district court's discretion, we will affirm the judgment of a district court acting in its appellate role unless the court has clearly abused its discretion.

Matter of HECI Exploration Co., Inc., 862 F.2d 513, 519 (citations omitted).

B.

Factors that have been considered by courts in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments. *See Manges*, 29 F.3d at 1039; *Rochman*, 963 F.2d at 471-72. The Trustees have not taken issue with our identification of these factors.

Although these five factors have been given varying weight, depending on the particular circumstances, the foremost consideration has been whether the reorganization plan has been substantially consummated. This is especially so where the reorganization involves intricate transactions, *see Rochman*, 963 F.2d at 473-74 (performance under plan involved "numerous complex arrangements"); *Roberts Farms*, 652 F.2d at 797 (plan involved "many intricate and involved

transactions" and reversal of plan's confirmation "would knock the props out from under" such transactions and "create an unmanageable, uncontrollable situation for the Bankruptcy Court"), or where outside investors have relied on the confirmation of the plan, *see Manges,* 29 F.3d at 1039 (equitable mootness "protects the interests of non-adverse third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented"); *UNR Indus.,* 20 F.3d at 770 ("[b]y protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate"); *Rochman,* 963 F.2d at 474 (reorganization involved $1.5 billion in financing from 100,000 sources); *Club Assocs.,* 956 F.2d at 1070 ("a number of investors, who were not parties to this case, had committed new funds to the 'reemerged Club' with the expectation of receiving a preferred return on their investments").

"Substantial consummation" is defined in the Bankruptcy Code as: "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2). In such instances, the strong public interest in the finality of bankruptcy reorganizations is particularly compelling.

The district court dismissed the Trustees' appeals to it as "moot" based on the conclusions, set forth in its opinion dated December 30, 1993, that substantial consummation of the Plan had occurred, the Investors had already made their $450 million investment into the reorganized entity, all elements of the Plan, except distributions to the unsecured creditors, had been completed, and a reversal of the order confirming the Plan likely would put Continental back into bankruptcy. App. at 1873. The court also noted that Continental had implemented the Plan following its approval by the court because the Trustees had failed to obtain a stay.

The Trustees do not challenge that there had been substantial consummation by December 1993, when the district court dismissed the appeals as moot. They suggest that as their object is not to disturb the reorganization, but only to get payment from the reorganized Continental for their adequate protection claim measured by the market value decline of the collateral during bankruptcy, the line of cases upon which Continental relies is inapplicable. We cannot agree, because the rejection of the Trustees' claim by the bankruptcy court was inextricably intertwined with the implementation of the reorganization. *See AOV Indus.*, 792 F.2d at 1148 (to evaluate mootness, court must "scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole"). Thus, the Trustees cannot avoid the effect of the substantial consummation of the reorganization plan so readily.

Inasmuch as Continental agrees that the issue is not constitutional mootness but prudential mootness, we will assume arguendo that even after substantial or total consummation of its reorganization, some effective relief would have been available for the Trustees' claim at the time they appealed to the district court, and on appeal to this court. Even before the in banc court, Continental has not challenged that assumption. It is quite another matter in light of the substantial, indeed irrevocable, change in the status quo that followed confirmation to determine that it would have been prudent for the court to reach the merits of the Trustees' claim. For the district court had before it an *unstayed* bankruptcy reorganization plan, and many courts have based their prudential decisions to decline to consider challenges to bankruptcy court orders on the ground that there has been substantial consummation of a plan of reorganization in reliance upon an unstayed confirmation order. *See, e.g., Rochman*, 963 F.2d at 475.

In *Chateaugay I,* the court noted that although the Bankruptcy Code only requires a stay pending appeal in limited circumstances, there is a procedure under Bankruptcy Rule 8005 to seek to preserve the status quo and "[t]he party who appeals without seeking to avail himself of that protection

does so at his own risk." 988 F.2d at 326. And in *In re Manges,* the court observed, under the descriptive title "Halting the Runaway Train: the Motions to Stay," that "in many of the cases in which bankruptcy appeals were dismissed as moot, the appellants failed to seek a stay." 29 F.3d at 1039.

Even the seeking of a stay may not be enough. The appellants in *In re UNR Industries* had sought a stay, albeit unsuccessfully, at every opportunity; nonetheless, the court noted, "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." 20 F.3d at 770; *accord AOV Indus.,* 792 F.2d at 1144, 1146-47.

Shortly after the confirmation of the Continental Plan, the Trustees filed an Emergency Motion for Conditional Stay of Order Confirming the Plan pending their appeal to the district court. The condition the Trustees sought in lieu of a stay was the establishment of a segregated account for $117 million, the full amount of their adequate protection claim, or alternatively at least $22 million, which they claim was the admitted decline in the value of the collateral. *See* App. at 1721. In response to the district court's inquiry, they conceded that they were not willing to post any bond. The district court never required a supersedeas bond in the amount of $450,000,000, as the Trustees have suggested. In fact, the district court tried to ascertain the amount of bond that would be reasonable, and the Trustees' general position was that they were "merely the fiduciary of the money of their bondholders" and they suggested no lesser amount App. at 1729.

Thus, as one of the reasons for its order denying the stay, the district court noted the unwillingness of the Trustees to post a bond satisfactory to the court. App. at 1756. *See, e.g., Central States,* 841 F.2d at 95 (appellant's failure to post bond to stay confirmation order basis for finding appeal moot). Because the failure to post the bond needed to get a stay permitted the consummation of the plan, this factor

weighs heavily in favor of the district court's declination to delve into the merits of the Trustees' appeal.

The Trustees argue that this court has held that failure to obtain a stay does not necessarily render an appeal moot. The cases to which they refer are not apposite. In one, *In re Joshua Slocum Ltd.*, 922 F.2d 1081 (3d Cir. 1990), the issue was the narrow one of the power of the bankruptcy court to excise a paragraph from a shopping center lease. There is no indication in *Slocum* that there had been any confirmation of a plan before or during the appeal.

In the more recent case to which the Trustees refer, *Megafoods Stores, Inc. v. Flagstaff Realty Assocs. (In re Flagstaff Realty Assocs.)*, 60 F.3d 1031 (3d Cir. 1995), the appeal also presented a narrow landlord-tenant issue, i.e. the effect of confirmation of the landlord's plan on a tenant's right to pursue its appeal of the bankruptcy court's denial of its recoupment claim. In holding that it was not necessary for the tenant to seek a stay in order to pursue its right to appeal despite the confirmation in the interim, we noted the line of cases placing recoupment and setoff in a special category and stated, "although we recognize the importance of maintaining the integrity of confirmed plans from later attack, these unique circumstances permit the plan to be reopened and readjusted." *Id.* at 1036. Thus, neither *Flagstaff* nor *Slocum* addressed the equitable or prudential mootness considerations at issue here.

High on the list of prudential considerations taken into account by courts considering whether to allow an appeal following a consummated reorganization is the reliance by third parties, in particular investors, on the finality of the transaction. *See Manges,* 29 F.3d at 1039 ("[t]he concept of 'mootness' from a prudential standpoint protects the interests of non-adverse third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented"); *Rochman,* 963 F.3d at 474-75 (similar). Here, the record is replete with evidence that the Investors relied on the bankruptcy courts unstayed Confirmation Order in making the decision to proceed to close the transaction and that an

essential factor in that decision was the bankruptcy court's disallowance of the Trustees' adequate protection claim.

The Plan of reorganization provided that the reorganized Continental would pay "Allowed Administrative Claims." App. at 656, 691 (Plan §§ 5.5, 10.1). Among the administrative claims that were still disputed at the time of the confirmation hearing were several large claims, including, in particular, labor claims by airline pilots, large claims by Eastern Airlines, and the Trustees claim for adequate protection based on alleged market decline of the collateral. App. at 1223, 1346. One of the concerns of the Investors that needed to be satisfied as a condition of their participation was that the total amount that would have to be paid for allowed administrative claims could be distorted by a few such large claims. To limit their exposure, the Investment Agreement provided that the Investors' obligation to proceed with the arrangements was subject, *inter alia,* to the payments and obligations for administrative claims being no higher than a specified amount, or "cap." App. at 408.

At the confirmation hearing, Continental's expert witness testified that if the claims of the Airline Pilots and the Trustees were excluded, the total allowed administrative claims payable under the Plan would be close to the cap, and that if the Trustees' claim were allowed, the cap would be exceeded, allowing the Investors to walk away from the deal. App. at 1223-24, 1333-38. Based on this testimony, Continental argued to the bankruptcy court that the feasibility determination required for confirmation under 11 U.S.C. § 1129(a)(11) would turn in part on the adjudication of the Trustees' still outstanding administrative claim. App. at 1400. Continental therefore urged the court to incorporate its adjudication of the Trustees' claim into the Confirmation Order itself, asserting that the Investors would not go forward with the deal "unless there is an order upon which they can place reliance, which is going to be a plan confirmation order." App. at 1400. The Trustees argued against incorporation, taking the position that even though the amount of the adequate protection claim allowed by the court would be relevant to the court's

subsequent determination of feasibility, the adjudication of the claim itself was a separate matter from plan confirmation. App. at 1401.

The bankruptcy court ultimately took the approach urged by Continental, incorporating into its Confirmation Order its decision denying the Trustees' adequate protection claim. As part of its feasibility determination, it explicitly found that neither the pilots' claims nor the Eastern claims was entitled to administrative priority, and that the Trustees' adequate protection claim had no value as an administrative claim. App. at 1549-51. On that basis, it found that there was substantial, credible and uncontested evidence that the administrative claims payable at confirmation -- excluding the claims of the pilots, Eastern, and the Trustees -- would be within the specified limit of the cap set forth in the Investment Agreement, App. at 1548, noting that the adjudications of the Trustees' claim and the Eastern claims were "crucial to the willingness of the Investors to consummate the Financing Transaction." App. at 1550.

We are unwilling to accept the Trustees' suggestion, implicit in their briefs and made explicit at oral argument, that the bankruptcy court's ruling on the merits of their adequate protection claim was colored by a so-called "ultimatum" from Continental that if the claim were granted the Investors would abandon the reorganization. *See* In Banc Argument Transcript at 3. The Trustees offer no evidence in support of this suggestion, and we certainly would not lightly impute such a motive to the bankruptcy court. In effect, the Trustees are challenging the Investors' right to condition their investment on the amount of approved administrative claims. This was never raised below at the time of the Investment Agreement, the ultimate confirmation or the period between. We know of no statute, rule or precedent that would deny investors the right to limit their investments on the existence of conditions which they believe give the newly reorganized company a reasonable opportunity to succeed -- such as, in this case, without being weighed down by excessive administrative expenses.

The Trustees also argue that Continental's position at the confirmation hearing, that the adjudication of the Trustees' claim should be incorporated into the Confirmation Order, was a "ploy" to "disingenuously" use the fact of such incorporation to "manufactur[e] the appearance of mootness." Appellants' Brief at 3; In Banc Argument Transcript at 1. Their characterization of Continental's position as a "ploy" implies that it had no legitimate reason. In light of the integral nexus between the feasibility of confirmation and the adjudication of the Trustees' claim, it appears that the suggestion of incorporation urged by Continental and adopted by the bankruptcy court was reasonable and reflected the inescapable fact that the Trustees' claim and the confirmation of the Plan were inextricably intertwined, rather than an attempt to "manufacture" the appearance of equitable mootness.

In dismissing the Trustees' appeals as moot, the district court specifically found that the Investors had relied on the bankruptcy court's unstayed Confirmation Order and that there was an integral nexus between the investment and the success of the Plan. The court stated, "[t]he Investors relied on the unstayed Confirmation Order in making the $450 million investment in Continental's Plan. It is clear that [the Trustees'] requested relief would undermine the grounds which the Investors relied upon in making their investment and would require a dismantling of the entire Plan." App. at 1874. Although the Trustees argue that this finding is erroneous, there is support for it in the record.

At the hearing in April 1993 before the district court on the Trustees' request for the conditional stay of the Confirmation Order, counsel for the Trustees stated they had testimony that "as a matter of business judgment, it would be extremely unlikely for the investors to walk away from this deal if . . . a 22-million-dollar deposit was established." App. at 1727. The Trustees' counsel in effect challenged the Investors to assert otherwise, stating that inasmuch as the Investors' counsel were in court they could correct any assertions that he made. *Id.* Thereafter, the Investors' attorney rose "to make clear the [I]nvestors' position, which is that if the relief is granted to

[the Trustees] which they seek from the Court this morning [the stay conditioned on a deposit of some $22 million to $117 million], then we are not prepared to close the transaction." App. at 1744.

The representative of the Investors explained that in the airline business "there is a great sensitivity to cash and the capital structure of a reorganized entity," and that the relief that the Trustees sought "could significantly impair the capital structure that would exist with respect [to] this reorganized airline." *Id.* at 1744-45. He reviewed the negotiations that had occurred for the cap for administrative expense liability, advised that the Investors had monitored on a monthly basis Continental's performance in that respect, and explained that the Investors had insisted that the Confirmation Order address the issue of the Trustees' claim "because we want to make sure if we are putting our money in, we are getting the benefit of our bargain, which is a reorganized entity with a capital structure that we contemplated." App. at 1746. He concluded by stating unequivocally that if a stay were entered conditioned upon the bond the Trustees sought, then his client would not be prepared to close this transaction." *Id.* The Trustees' counsel did not thereafter argue that the Investors' counsel's statements were insufficiently probative, and therefore that suggestion here is less than persuasive.

The Trustees have not contested here that if their claim for market value decline of the collateral (a claim independent of their claim for the use and maintenance of the collateral, which has been satisfied) had been approved as an administrative claim, the total such administrative claim would have greatly exceeded the cap specified by the Investors for that purpose. This would have given the Investors the option to withdraw; such withdrawal would have placed the entire Plan in jeopardy. By the time the district court ruled on the appeal, it was no longer possible to restore the parties to their earlier positions because the investment had been made, and the option to withdraw was no longer available to the Investors. *See Specialty Equip.*, 3 F.3d at 1049 (claim held moot when its acceptance would amount to imposing a different plan of

reorganization on the parties"). Thus, the third factor bearing on the prudential determination whether to reach the merits of a bankruptcy appeal after confirmation and in the absence of a stay -- the effect of the requested relief on the rights of parties not before the court -- weighs heavily against the Trustees.

This factor cannot fairly be recast as whether the Investors or others reasonably relied on the prediction that the Trustees would recover nothing on their claim. While we agree that reliance of the Investors and others on the unstayed Confirmation Order is of central importance to our analysis, to focus on the "reasonableness" of that reliance, at least as measured by the likelihood of reversal on appeal, is necessarily a circular enterprise and therefore of little utility. Whether the Investors were reasonable in relying on the bankruptcy court's order depends on whether this was a case that would be considered on the merits on appeal or would be dismissed on the basis of the doctrine often referred to as "equitable mootness." And whether this case would be dismissed on "equitable mootness" grounds on appeal in turn depends on whether the Investors reasonably relied. Thus, placing the focus on the reasonableness of the Investors' reliance as measured by the probability that Continental would prevail on appeal sets up a straw man which is easily knocked down.

Our inquiry should not be about the "reasonableness" of the Investors' reliance or the probability of either party succeeding on appeal. Rather, we should ask whether we want to encourage or discourage reliance by investors and others on the finality of bankruptcy confirmation orders. The strong public policy in favor of maximizing debtors' estates and facilitating successful reorganization, reflected in the Code itself, clearly weighs in favor of encouraging such reliance. Indeed, the importance of allowing approved reorganizations to go forward in reliance on bankruptcy court confirmation orders may be the central animating force behind the equitable mootness doctrine. *See Rochman*, 963 F.2d at 471-72; *Metro Property Mgmt. Co. v. Information Dialogues, Inc. (In re Information Dialogues, Inc.)*, 662 F.2d 475, 477 (8th Cir. 1981). Where, as here, investors and other third parties consummated a

massive reorganization in reliance on an unstayed confirmation order that, explicitly and as a condition of feasibility, denied the claim for which appellate review is sought, the allowance of such appellate review would likely undermine public confidence in the finality of bankruptcy confirmation orders and make successful completion of large reorganizations like this more difficult. This is true regardless of whether the Investors reliance was "reasonable" or based on a 30%, 60%, or 100% probability of success on appeal, an issue raised at the oral argument.

In arguing against dismissal here on the basis of prudential considerations, the Trustees repeatedly rely on their assertion that the Plan contained "a built-in mechanism for the [post-confirmation] disposition and payment of Disputed Administrative Claims." Appellants' Brief at 10. On the basis of this provision, they argue that they had no obligation to take steps to preserve the status quo through a stay, that their appeal is not moot because "some effective relief" is available, and that the Plan is contractually "binding" on Continental. They conclude that the district court therefore erred in "permitt[ing] Continental to escape its 'contractual' obligations under the Plan under the guise of the mootness doctrine." Appellants Brief at 20. While the Trustees' description of the "mechanism" provided in the Plan is technically correct, they overstate the impact of that mechanism.

Under the definitions in the Plan, the Trustees' claim was a "Disputed Administrative Claim" because it sought adequate protection payments, *see* App. at 623-24 (Plan § 1.4(vi)) and was the subject of a timely objection, *see* App. at 632 (Plan § 1.85(a)). The Plan requires the reorganized Continental to pay *allowed* administrative claims on the later of: the effective date of confirmation or "the fifth Business Day after such Claim is Allowed." App. at 691 (Plan § 10.1). Further, the Plan provides that "[a] Disputed Claim shall be an Allowed Claim if, and only to the extent that, such Disputed Claim has been Allowed by a Final Order," App. at 623 (Plan § 1.5), and defines a "Final Order" as "[a]n order which is no longer subject to appeal, *certiorari* proceeding or other proceeding

for review or rehearing, and as to which no [such proceeding is] pending," App. at 635 (Plan § 1.100).

Thus, the Plan imposes an obligation on the reorganized Continental to pay disputed administrative claims once they become allowed by a final order of court, even if such final order does not occur until after confirmation. If the bankruptcy court's disallowance of the Trustees' claim were to be reversed on appeal, the Plan appears to provide a "mechanism" for payment of the claim by the reorganized Continental. The mere availability of such a mechanism, however, which may prevent dismissal on the ground of Article III constitutional mootness, does not warrant reversal of the district court's order dismissing it on prudential grounds. As we have noted, the district court's "mootness" determination was based not on a finding that no effective relief was available, but rather on the finding that in light of all the circumstances, it would be inequitable to grant relief. Nor has any "contractual obligation" been violated either by Continental or the district court. Where, as here, there has been no order, final or otherwise, allowing the Trustees' disputed administrative claim, the Plan imposes no obligation on the reorganized Continental to pay it.

Finally, the Plan provisions allowing for post-confirmation payment of allowed claims in no way obviated the Trustees' obligation to seek a stay. Here, where the confirmation of the Plan and the willingness of the Investors to go forward turned on the bankruptcy court's denial of the Trustees' claims, and where the denial of those claims was in fact incorporated into the Confirmation Order, there was a clear possibility that the Trustees' claims would become moot after consummation of the Plan, and it was therefore incumbent on the Trustees to obtain a stay. Indeed, the record shows that all parties were well aware of the extensive legal precedent dismissing as moot or on equitable grounds appeals from unstayed consummated reorganizations. *See* App. at 410 (references in the Investment Agreement); App. at 1729-30, 1741 (argument before the district court on the stay).

For similar reasons, we fail to see the inconsistency charged by the Trustees between Continental's current position as to "equitable mootness" and its argument to the bankruptcy court in response to the Trustees' Deposit Motion that the Plan would require payment of the Trustees' claim by the reorganized Continental if and when allowed. *See* App. at 1039. As noted above, the Plan imposes no obligation on Continental in the absence of a final order allowing the Trustees' claim, and the mere availability of a mechanism for granting relief does not mean the court cannot determine that in light of all the circumstances it should not even try to unscramble the eggs.

Moreover, at the time Continental argued against the Deposit Motion the bankruptcy court had not yet ruled disallowing the Trustees' claim nor cited that as an explicit basis for its feasibility determination in confirming the plan. Accordingly, Continental did not yet have reason to know that the claim would be denied and become subject to "equitable mootness" on appeal. As soon as the basis for this mootness argument became apparent, Continental repeatedly asserted its intention to make such an argument if an appeal was filed and no stay obtained. App. at 1691, 1742.

The Trustees have not presented us with any arguments which would weigh against all of the prudential considerations that dictate that this consummated reorganization must be left in place. Following confirmation, Continental was operating as a restructured company, and had entered into countless new relationships and transactions. To convince a court to take the action sought by the Trustees which would undermine the basis for the Investors' decision to proceed, the Trustees would have to proffer a powerful reason indeed. They have not even attempted to do so.

Arrayed against that silence are the facts that the reorganization plan was consummated, no stay was obtained, numerous other parties have changed their positions, and numerous irrevocable transactions have since been completed as a result of the consummation of the Plan. Without listing all of such

transactions set forth by Continental in its brief, we note that among those are the distribution to unsecured creditors, the merger of 53 debtors other than Continental with and into Continental, the investment of $110 million in cash by Air Partners and Air Canada in the reorganized Continental, the transfer by foreign governments of various route authorities, and the assumption by the reorganized Continental of unexpired leases and executory contracts worth over $5.0 billion. Thus, the key issue really is whether the district court abused its discretion in weighing the various equitable factors. We are not prepared to hold that the balance reached by the district court was an abuse of its discretion.

Under the circumstances presented here, we can see no prudential considerations that would support an attempt by an appellate court, district or court of appeals, to fashion even a limited remedy for the Trustees. That would necessarily entail imposing a new debt on the reorganized company, which is a different entity than it was when this case was before the district court. Thus, we agree with the determination of the district court to dismiss the Trustees' claim. We base our holding on our conclusion that it would be neither prudent nor equitable to grant the Trustees the relief they seek.[2]

III.

CONCLUSION

For the reasons set forth we will affirm the order of the district court.

In Re: Continental Airlines
No. 94-7748

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[2] In light of our decision, we do not separately consider whether some of the issues presented might have been avoided had the bankruptcy court ruled more expeditiously on motions presented by the parties. We do not know the circumstances, nor the events that may have contributed to what appear, on the docket sheet, to be long delayed rulings.

ALITO, *Circuit Judge*, dissenting, joined by Judges Becker, Greenberg, Lewis, McKee and Sarokin.

The majority's decision in this case creates a bad precedent for our circuit. The majority adopts the curious doctrine of "equitable mootness," which it interprets as permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief. According to the majority, there is no clear rule for determining when a bankruptcy appeal is "equitably moot." Instead, this is said to be a discretionary determination to be made in the first instance by the district court based on a weighing of five factors that the majority has culled from the opinions of our "sister circuits." In my view, if the doctrine of "equitable mootness" has any validity, it is more limited than the majority holds.

The dangers inherent in the majority's adoption and broad interpretation of this doctrine are illustrated by this case. In simple terms, this is what happened. After filing for relief under Chapter 11 of the Bankruptcy Code, Continental Airlines continued to use certain aircraft and jet engines that were held as collateral entrusted to the Trustees. Believing that their collateral was undergoing a dramatic diminution in value, the Trustees in August 1992 filed a renewed motion in the bankruptcy court seeking "adequate protection" under 11 U.S.C. § 363(e). During the next eight months, while the Continental reorganization plan proceeded toward confirmation, the bankruptcy court did not rule on this motion. In March 1993, Continental insisted that the bankruptcy court rule on the Trustees' motion at the same time that it confirmed the plan, and Continental told the bankruptcy judge that unless the motion was denied, the prospective investors in the reorganized corporation would withhold funding, and the reorganization would not go forward. *See* Continental Br. at 5-6 & n.1. Furthermore, Continental took the position that if the plan was confirmed and went into effect, any appeal would be moot. *See* Continental Br. at 21. The bankruptcy court then simultaneously denied the Trustees' motion and entered the order

confirming the plan. The Trustees exercised their statutory right to appeal to the district court, and in my view the need for review by an Article III court is particularly acute when the challenged ruling of the bankruptcy court is made under circumstances such as these.[1]

The Trustees, however, have been utterly denied such review. In the initial level of appeal, the district court opined that the Trustees probably would have won if the merits of their appeal had been reached (JA 1755-56), but the district court dismissed their appeal as moot. Likewise, the majority of our court describes the Trustees' arguments as "interesting and challenging" (Maj. Op. at 9) but then throws them out of court without reaching the merits of their arguments. And the majority does this even though (a) this case is clearly not "moot" in any proper sense of the term, (b) we unquestionably have statutory jurisdiction and (c) we have a "virtually unflagging obligation" to exercise the jurisdiction that we have been given. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 817 (1976). I am puzzled and troubled by what the majority has done.

I.

As the majority notes, the Trustees have not contested the existence of the doctrine of "equitable mootness," and in light of the Trustees' position, I think that it is appropriate to assume the existence of this doctrine for purposes of this appeal. The majority opinion, however, does not simply assume the existence of this doctrine but adopts it as part of the law of our circuit. In doing so, the majority does not undertake an independent analysis of the origin or scope of the doctrine but is instead content to rely on the decisions of other courts of appeals. From these decisions, the majority extracts five factors, which are to be weighed by the district court in the initial level of appeal for the purpose of determining whether the

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[1] I wish to make clear that I express no criticism of Continental or the bankruptcy judge. My point is simply that the Trustees' statutory right to Article III review should be honored.

appeal is "equitably moot." Maj. Op. at 14. These factors are: "(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments." Maj. Op. at 15.[2]

I am not convinced that the majority's test is consistent with the law of all of the circuits that the majority claims to be

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[2] Even if I were prepared to endorse the majority's five-factor test, I would strongly disagree with its holding that the weighing of these factors is a discretionary determination to be made in the first instance by the district court and reviewed by us for abuse of discretion. In support of this holding, the majority relies on an abstention case, a laches decision, and two opinions involving the scope of remedial orders. *See* Maj. Op. at 15. The majority does not rely on any bankruptcy cases -- undoubtedly because there is an unbroken and well-established line of authority from this court holding that "[b]ecause the district court sits as an appellate court in bankruptcy cases, our review of the district court's decision is plenary." *See, e.g., In re Visual Industries, Inc.*, 57 F.3d 321, 324 (3d Cir. 1995) (citing *In re Stendardo*, 991 F.2d 1089, 1094 (3d Cir. 1993)); *see also In re Cohn*, 54 F.3d 1108, 1113 (3d Cir. 1995) ("Our review of the district court's order is plenary because in bankruptcy cases the district court sits as an appellate court.") (citations omitted); *In re Columbia Gas System Inc.*, 50 F.3d 233, 237 (3d Cir. 1995); *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101 (3d Cir. 1981). Here, as in the cases cited above, the district court sat as an appellate court; I would apply the above decisions -- which I assume the majority does not mean to overrule -- and exercise plenary review over the district court's order in this case.

Separate and apart from the fact that our precedent calls for application of plenary review in this case, I further believe that such review is appropriate here. We are essentially called on to review whether the district court properly decided not to reach the merits of the Trustees' appeal. We are in just as good a position to make this determination as was the district court, which sat as an appellate court in this case. In addition, the majority acknowledges that the doctrine it adopts must be "limited in scope and cautiously applied," *see* Maj. Op. at 13, and I think that plenary review would better serve these ends.

following. For example, the Eleventh Circuit holds that the proper test is "whether the 'reorganization plan has been so substantially consummated that effective relief is no longer available.'" *In re Club Associates*, 956 F.2d 1065, 1069 (11th Cir. 1992) (quoting *Miami Center Ltd. Partnership v. Bank of New York*, 820 F.2d 376, 379 (11th Cir. 1987)). This inquiry seems quite different from the majority's indeterminate five-factor test. But even if the majority's analysis is supported by the decisions it cites, and even though I think that those decisions deserve careful and respectful consideration, I think that the in banc majority should have made an independent examination of the basis and scope of the doctrine of "equitable mootness" before engraving it in our circuit's law.

What is the basis of this doctrine? As the majority acknowledges, it does not stem from the "case-or-controversy" requirement of Article III. *See* Maj. Op. at 10. For example, it is not argued that the case now before us is moot in the Article III sense.

Nor does it appear that this doctrine is rooted in non-Article III mootness decisions "reflect[ing] avowedly flexible doctrines of remedy and judicial administration." 13A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3533.1 at 222 (1984). These doctrines are said to focus on the question whether "granting a present determination of the issues offered, and perhaps the entry of more specific orders, will have some effect in the real world." *Id.* at § 3533.1 at 226 (footnote omitted). Here, it is clear that a determination of the merits of the issues raised by the Trustees and the entry of a remedial order on the basis of such a determination would have "some effect" -- and potentially quite a substantial effect -- in the real world. (That is precisely why Continental does not want us to entertain the appeal!)

Thus, as this case well illustrates, the doctrine of "equitable mootness" is not really about "mootness" at all in either the Article III or non-Article III sense. As the Seventh Circuit stated in a passage that the majority quotes with approval (*see*

Maj. Op. at 12), "[t]here is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness'). Using one word for two different concepts breeds confusion." *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir.) (emphasis in original), *cert. denied*, 115 S. Ct. 509 (1994).

If the doctrine of "equitable mootness" is not based on real mootness principles, on what is it based? The cases cited by the majority and the parties suggest two possible answers.

The first is provided by the earliest court of appeals decision cited by the majority, *In re Roberts Farms Inc.*, 652 F.2d 793, 796-97 (9th Cir. 1981), and several others. *See In re AOV Industries, Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986); *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). The modest authority on which the *Roberts Farms* court relied was a provision of former Bankruptcy Rule 805, which concerned stays pending appeal. Added by a 1976 amendment to the rule, the provision in question stated:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

Although I do not find the *Roberts Farms* opinion entirely clear, I think that the best reading of the opinion is that the challenge to the plan of reorganization in that case could not be entertained because no relief was practicable as a result of the many post-confirmation transactions that were irreversible due to this provision of former Rule 805. *See* 652 F.2d at 797. In any event, whether or not this is what the *Roberts Farms* court meant to say, I do not see how any broader rule could reasonably be extracted from the provision of former

Bankruptcy Rule 805[3] on which the *Roberts Farms* court relied or from the analogous provisions now contained in 11 U.S.C. §§ 363(m) and 364(e).[4] If one begins with narrow provisions such as these -- which merely prevent the upsetting of certain specific transactions if stays are not obtained -- I do not see how one can derive the broad doctrine of "equitable mootness" that the majority in this case appears to embrace.

What apparently happened, however, was that the holding of *Roberts Farms* was gradually extended well beyond anything that could be supported by the authority on which *Roberts Farms* rested. Subsequent cases first cited *Roberts Farms* in support of the proposition that a bankruptcy appeal cannot be entertained if the court could not grant "effective relief." *See, e.g., In re Information Dialogues, Inc.*, 662 F.2d at 477. Later, *Roberts Farms* was interpreted more expansively to mean that an appeal could not be entertained if a court could

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[3] The current rule governing stays pending appeal, Bankruptcy Rule 8005, does not contain similar language, but analogous requirements now appear in 11 U.S.C. §§ 363(m) and 364(e). *See* footnote 4, *infra*.

[4] 11 U.S.C. § 363(m) states:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 364(e) states:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

not award relief that was "equitable." *See In re Chateaugay Corp.*, 988 F.2d 322, 324 (2d Cir. 1993) (citing *Roberts Farms*). And this latter holding figures prominently in the majority's analysis. *See* Maj. Op. at 12. In my view, this gradual but ultimately quite substantial extension of *Roberts Farms* cannot be squared with the narrow authority on which that decision relied. Accordingly, if anything like the majority's decision in this case is to be defended, some other foundation for the doctrine of "equitable mootness" must be found.

The second possible basis for the doctrine of "equitable mootness" is suggested in *In re UNR Indus., supra,* where the Seventh Circuit wrote:

> Several provisions of the Bankruptcy Code of 1978 provide that courts should keep their hands off consummated transactions. For example, 11 U.S.C. § 363(m) says that the reversal of an order authorizing the sale or lease of property of an estate "does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal." Unless the sale is stayed pending appeal, the transaction survives even if it should not have been authorized in the first place. *See In re Sax*, 796 F.2d 994 (7th Cir. 1986); *cf. In re Edwards*, 962 F.2d 641 (7th Cir. 1992) (concluding that § 363(m) does not, however, forbid all forms of collateral attack). Another section of the Code, 11 U.S.C. § 1127(b), dramatically curtails the power of a bankruptcy court to modify a plan of reorganization after its confirmation and "substantial consummation." Section 1127(b), unlike § 363(m), does not place any limit on the power of the court of appeals, but the reasons underlying §§ 363(m) and 1127(b) -- preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg -- are so plain and

> so compelling that courts fill the interstices of the Code with the same approach.

20 F.3d at 769. Thus, the court seemed to say that the Bankruptcy Code contains an "interstice" -- a gap -- regarding the circumstances under which an appeal that might upset a plan of reorganization may be pursued. Further, the court appeared to suggest that the federal courts have the authority to create a rule of federal common law to fill this gap. *See, e.g., United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 593 (1973) (referring to the "'power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress'") (citation omitted).

This is an interesting theory, but I find it unnecessary to decide in this case whether it is correct. For present purposes, what is important is to note that, even if this theory is correct, it has nothing to do with mootness. Instead, it concerns a federal common law rule designed to promote certain policies of chapter 11 of the Bankruptcy Code. These policies are the facilitation of reorganizations and the protection of those who reasonably rely on reorganization plans. As I explain below, neither of these policies justifies what has happened in this case -- the refusal of the Article III courts to entertain a live appeal over which they indisputably possess statutory jurisdiction and in which meaningful relief can be awarded.

II.

A. How can the objective of preserving the Continental reorganization justify what the majority has done? The Trustees are not seeking to upset the plan of reorganization; rather, they are attempting to obtain payments that they claim are due to them *pursuant* to that plan. Moreover, even if the success of the reorganization might be imperilled if the Trustees obtained the full relief that they are seeking -- an empirical proposition that is not self-evident -- the courts could surely fashion some measure of lesser relief that would not disturb the reorganization. In order to justify its decision, which

slams the courthouse door on the Trustees before they are even heard on the merits, the majority would have to show that the Trustees could not be awarded *any relief* -- not one dollar -- without upsetting the Continental reorganization, and obviously they cannot do any such thing. I do not dispute the desirability of preserving the Continental reorganization, but to my mind this objective implicates a question of remedy, to be decided after the merits of the Trustees' arguments are addressed, and not a threshold question of "mootness."

In treating this as a threshold question, the majority, I believe, has been confused by the misleading term "equitable mootness," which, as I have discussed, does not actually involve mootness at all. The federal courts are accustomed to considering questions of Article III mootness, and the majority, in my view, has fallen into the trap of thinking that the question of "equitable mootness" that is now before us must be treated as if it were a question of Article III mootness. Whether a case is moot in the Article III sense is, of course, a jurisdictional question, *see, e.g.*, *Rosetti v. Shalala*, 12 F.3d 1216, 1223 (3d Cir. 1993), and therefore it is a question that we are obligated to resolve before we consider the merits of an appeal. *See, e.g.*, *United Wire Metal and Machine Health and Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1190 (3d Cir.), *cert. denied*, 114 S. Ct. 382 (1993); *Rogin v. Bensalem Tp.*, 616 F.2d 680, 684 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). Moreover, if we conclude that an appeal is moot in this sense, we have little remedial flexibility; we generally have no choice but to dismiss. *See*, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389-90 (1994); *Mills v. Green*, 159 U.S. 651, 653 (1895) (when "an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal").

By contrast, the doctrine that is involved here -- which is not really a doctrine of mootness at all -- does not demand or justify similar treatment. It does not present a jurisdictional

question; we are not required to consider it before proceeding to the merits; and even if we find that it is applicable, it does not necessarily dictate that we dismiss the appeal or affirm in its entirety a district court order of dismissal. Rather, we retain the ability to craft, or to instruct the district or bankruptcy courts to craft, a remedy that is suited to the particular circumstances of the case. Thus, a remedy could be fashioned in the present case to ensure that the Continental reorganization is not undermined.

B. Much the same is true with respect to the objective of protecting reasonable reliance interests. In my opinion, this is also a remedial consideration; if the Trustees win on the merits, the need to protect reasonable reliance interests can be fully taken into account in crafting an appropriate remedy. I thus see no need to resolve the question of reasonable reliance interests at this time.

The majority, however, not only wrongly treats this as a threshold, rather than a remedial, consideration, but engages in an analysis that flies in the face of the language of the plan and seems to assume an extraordinary degree of naivete on the part of the Investors and the others who are said to have relied on the plan.

I will focus on the Investors because their plight looms large in the majority's analysis. When the Investors decided to invest in the reorganized company, NewCal, they knew or should have known that under the reorganization plan NewCal would be required to pay the Trustees' claim if it was ultimately allowed. Section 10.1 of the plan provided that NewCal would pay "Allowed Administrative Claims." Moreover, in order to persuade the bankruptcy court to reject the Trustees' request that a cash reserve be established prior to confirmation to cover their claim, Continental argued that such a reserve was unnecessary because if the Trustees' claim was allowed it would be "an Allowed Administrative Claim which would be paid in accordance with the terms of Section 10.1 of the Plan." JA 1039. Under these circumstances, any prudent investor, in deciding whether to invest in NewCal on

particular terms, would have taken into account the range and likelihood of possible outcomes in the Trustees' appeal, including the possibility that some or all of the amount sought by the Trustees would have to be paid as an administrative claim pursuant to Section 10.1 of the plan. No reasonable investor would have proceeded on the assumption that the Trustees would definitely recover nothing. And the same is true of the other parties that relied on the plan. Thus, I am skeptical about the reliance interests that are claimed here, but in any event I fail to see why this issue needs to be resolved at the threshold of this case rather than at the remedial stage, if that stage is ever reached.

C. One final aspect of the majority opinion warrants a response, and that is the majority's discussion of the Trustees' failure to seek or obtain a stay. I have two comments regarding this discussion.

First, while it might be desirable to have a rule that flatly requires a stay whenever a party takes an appeal that might upset a plan of reorganization, neither the Bankruptcy Code nor the Bankruptcy Rules contain any such sweeping provision; our court had not adopted any such rule at the time of the Trustees appeal[7] (and, indeed, still has not done so); and it would consequently be unfair to apply such a rule to the Trustees retroactively.

Second, in the absence of such a blanket rule, we should focus on whether the purposes that would be served by a stay require that the Trustees be thrown out of court at the threshold. The purpose of a stay in this context is to prevent transactions that might otherwise occur in reliance on the plan of reorganization and that would be difficult or painful to undo if

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[7] In *In re Joshua Slocum, Ltd.* 922 F.2d 1081, 1085 (3d Cir. 1990) (footnote omitted), we noted that only two provisions of the Bankruptcy Code, 11 U.S.C. §§ 363(m) and 364(e), specifically require that a party seek a stay pending appeal," and we "declined to interpret the mootness principles in such a way that would, in effect, create a third situation where parties are required to seek a stay."

the appeal were to succeed. Accordingly, the Trustees' failure to obtain a stay in this case might limit the relief that would be available to them if they succeeded on the merits of their appeal, but it cannot justify the refusal at the outset even to consider their arguments.

In sum, I believe that the Trustees' claim should be entertained on the merits. The mere act of entertaining that claim would not imperil Continental's reorganization or impair any legitimate reliance interests. If the Trustees' claim were considered and they won on the merits, any threat to the reorganization or to legitimate reliance interests could be taken into account in framing the Trustees' relief. What the district court and the majority have done -- throwing the Trustees out of court before the merits of their claim are even heard -- is unjustified and unjust.

For these reasons, I respectfully dissent. I would reverse the order of the district court and remand for a decision on the merits.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 94-7748

IN RE CONTINENTAL AIRLINES:

NATIONSBANK OF TENNESSEE, N.A., f/k/a NationsBank of Tennessee, as Collateral Trustee under a Secured Equipment Indenture and Lease Agreement dated March 15, 1987 ("NationsBank"); NEW JERSEY NATIONAL BANK, as successor by merger to Constellation Bank, N.A., f/k/a National State Bank of Elizabeth, N.J.; HARRIS TRUST AND SAVINGS BANK; and BOATMAN'S FIRST NATIONAL BANK OF OKLAHOMA, as First, Second and Third Priority Secured Equipment Certificates Trustees thereunder, respectively (the "Series Trustees" and, collectively with NationsBank, the "Trustees"),

Appellants

On Appeal from the United States District Court
for the District of Delaware
C.A. No. 93-195-JJF
(Bankruptcy Nos. 90-932 through 90-984)

Present: Sloviter, *Chief Judge*, Becker, Stapleton, Mansmann, Greenberg, Scirica, Cowen, Nygaard, Alito, Lewis, McKee, Sarokin and Seitz, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued on September 15, 1995 and reargued in banc by counsel on May 14, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Court entered December 12, 1994, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Brad Baldus

Chief Deputy Clerk

Dated: JUL 31 1996

Certified as a true copy and issued in lieu
of a formal mandate on August 22, 1996

Teste: /s/ Brad Baldus

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

IN RE:	:	Docket No. 94-7748
CONTINENTAL AIRLINES	:	
	:	
_____	:	May 14, 1996

ORAL ARGUMENT

BEFORE: THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
SITTING IN BANC

APPEARANCES:

For Continental: RICHARD SCHIFTER, ESQ.

For the Collateral and Series Trustees: GARY JACOBSON, ESQ.

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THE COURT: Okay, we'll hear argument in In Re: Continental. The same protocol applies, ten minutes uninterrupted time each side.

MR. JACOBSON: Your Honor, may I respectfully request reserving three minutes for rebuttal?

THE COURT: Yes, of course, you may request it and it's granted. I may interrupt you if we can't hear you. Is the mike on? Okay.

MR. JACOBSON: May it please the Court, my name is Gary Jacobson. I represent the Bank of New York, the successor collateral trustee to NationsBank of Tennessee which represented the interest of bond holders who held $180 million in debt secured by 29 aircraft and 81 jet engines leased to Continental Airlines.

Your Honor, we're here today for two reasons. First, because the Bankruptcy Court prevented the holders of that debt from being paid a penny for Continental's use of that equipment while the value deteriorated drastically over the two and a half years of Continental's Chapter 11 case.

We are here secondly because Continental and its new owners in trying to prevent the appellate review of the erroneous decision of the Bankruptcy Court by manufacturing the appearance of equitable mootness.

Your Honor, the panel's decision accurately recaps the procedural history, and the essence of this appeal is how the plan of reorganization nullified the separate contested matter which established the amount of the administrative adequate protection claim of the trustees.

The plan of reorganization proposed to grant a controlling equity position in Continental to the investors. It defined adequate protection claims as administrative claims which meant that those are the kind of claims that had to be paid 100 percent in cash on confirmation of the plan. The plan provides that the administrative claims that were disputed by Continental, like those of the trustees, could be litigated after confirmation, and if allowed would be paid by the reorganized corporation.

The trustees were concerned about the priority position of their disputed claims. Accordingly, they asked the Bankruptcy Court to establish a cash reserve against their disputed adequate protection claim to ensure that the claim would be paid if and when it was allowed after confirmation. Before the Bankruptcy Court, Continental opposed that motion, asserting

the trustees' rights were fully protected by the terms of the plan concerning payment on the administrative claims.

The significance of that below, Your Honors, and when the creation of the artifice of equitable mootness really took place appear on pages 1400 to 1402 of the appendix, March 30th before the Bankruptcy Court. Continental stood before the Bankruptcy Judge towards the end of the confirmation hearing and said, "Over here, we have investors ready to inject $450 million into this corporation and bring it out of Chapter 11. Over here we have trustees whose administrative claim we are contesting who are claiming $117 million. Judge Balick, you must reject the trustees' adequate protection claim first." Secondly, Continental said, you must incorporate that ruling in the plan Confirmation Order. It must be in one Order because the investors do not want to face appeals. And if you don't do this, the investors are going to walk, not pay the $450 million, and the plan will not be confirmed.

Unfortunately, the Bankruptcy Court complied with that ultimatum. The Bankruptcy Judge was faced with undisputed proof of a tremendous decline in value of the collateral which had been presented in the separate ten day adequate protection hearing. Faced with that proof, in order to rule in Continental's favor, Judge Balick had to reach a legal conclusion, in which she reversed her prior holding that it was not necessary for the trustees to move to lift the automatic stay in order to obtain adequate protection. That holding in Continental II made new law. It's contrary to the terms of the Bankruptcy Code, it's not supported by the bankruptcy rules, case law or any legislative history, but that's the law that was made on the date of the confirmation hearing. That holding in Continental II is impractical, it's illogical. Yet, it's the law of this case which has not been subject to review.

The trustees promptly appealed Judge Balick's ruling to the District Court. At the time the appeal was filed, because again of their concern that they would lose their super priority status for their claim, the trustees moved to stay confirmation. Continental demanded a bond of $450 million, the amount that

would be lost if the investors didn't close the transaction. Because Continental had not made any lease payments or debt service for two and a half years, the trustees, who are trustees for public debt, had no money to pay a bond. However, to minimize any prejudice because of the strong interest in seeing Continental come out of Chapter 11, the trustees sought to expedite their appeal. They filed their merits appeal brief six days after confirmation with their stay application so that the District Court could reach the merits of Judge Balick's ruling without undue delay. The District Court apparently did not find that sufficient. Although the District Judge found a likelihood of success on the merit of the appeal, in the absence of the bond, the District Judge denied the stay of confirmation.

Continental confirmed, consummated the plan, the investment closed. Now controlled by the investors, Continental moved to dismiss the appeal before the District Court. Continental told the District Court regardless of what the plan said about the treatment of the disputed administrative claims, the appeal was moot. This represented a tremendous about face from its previous assurance to the Bankruptcy Court that a cash reserve was not necessary to protect the trustees' interest after the effective date of the plan.

The appeal was dismissed, and on rehearing the dismissal was reiterated and this panel, 2 to 1, affirmed that decision.

As Judge Alito's dissent recognized, the factors in which the Court could consider equitable mootness principles in this case boil down to one issue, whether the reasonable reliance interest of the investors should bar the consideration of the merits of the appeal.

We contend that the investors' reliance was not reasonable for at least four reasons. First, the Bankruptcy Court reversed itself on a matter of law on the lift stay issue. We don't believe it was reasonable to believe that an Appellate Court would not review such a legal ruling, that was plainly unique and unprecedented.

Secondly, in denying the stay the District Court found a likelihood of the trustees' success on the merits of the appeal.

Third, the investors ignored the plan's plain provisions which provided that the administrative claims could be adjudicated and allowed after confirmation.

Fourth, the Bankruptcy Court's delay in ruling on adequate protection and incorporation of its findings into the Confirmation Order was done expressly at the request of the investors. They set it up. It was not as if they were relying upon as a third party upon the acts of the Bankruptcy Court.

Your Honor, we submit that if the District Court's decision is affirmed, there is strong policy implications. Bankruptcy Courts would be under pressure from plan proponents to disallow claims they don't like, the proponents don't like, in order to make a plan feasible.

Secondly, tying allowance of claims to plan confirmation effectively will ever prevent review of those determinations by an Article Three Court, particularly in large cases because of the imposition of a bond requirement.

Third, the effect of the plan after confirmation will be rendered uncertain and thrown up in the air because of the possibility that prudential concerns might be applied later in reviewing it.

And fourth, as this case illustrates, the refusal to reach the issue on the merits generates collateral litigation where the trustees are being sued by the certificate holders for not moving to lift the stay premised entirely on Judge Balick's decision, unique and unprecedented decision which was never reviewed on the merits.

So the refusal of this Court and the District Court below to, heretofore, review those decisions on the merits has created more litigation rather than less.

Your Honor, I'll be happy to take questions.

THE COURT: I just have one. I'm not clear, and I read the briefs very carefully about one thing factually. The trustees had a certain debt that was owed to them when the Chapter 11 petition was filed, right?

MR. JACOBSON: Yes, Your Honor.

THE COURT: All right. How was that debt dealt with in the plan of reorganization, and what are the general numbers? In other words, what happened to that debt as such which is a distinct matter from what you're involved with now? I just didn't understand it.

MR. JACOBSON: The debt was $180 million, Continental returned the equipment at the conclusion of the Chapter 11 when the plan was confirmed, and the trustees were given a $109 million unsecured claim.

THE COURT: So they got the equipment back?

MR. JACOBSON: Yes, at the conclusion of the Chapter 11 case.

THE COURT: The reorganized airline didn't need it?

MR. JACOBSON: At the time it got the equipment back and entered into the so-called new lease, where the trustees then leased the equipment back to Continental --

THE COURT: To New Cal?

MR. JACOBSON: To New Cal for up to a year. And to be accurate, it was made retroactive to February 1st, 1993 so it actually nunc pro tunc covered the last two months of the Chapter 11 case.

THE COURT: So you got your equipment back plus $109 million as if you were a general creditor?

MR. JACOBSON: Correct.

THE COURT: Why didn't you appeal the denial of the stay?

MR. JACOBSON: Your Honor, the plan was closed by Continental immediately that evening. We didn't have time to go to the Circuit.

THE COURT: You didn't have time to go to the Circuit? You just go to one judge and get a one judge stay, pending going to a three judge panel. You knew how to appeal that denial, didn't you?

MR. JACOBSON: Yes, Your Honor, and that appeal would have required us to mandamus the Distrust Court which is a very different standard than the standard that would have been applied in the first instance.

THE COURT: Why mandamus? All you asked for is a stay of the District Court Order.

MR. JACOBSON: Your Honor, the case law from other circuits said that the appeal of a District Court's denial of a stay of plan of confirmation is done by mandamus before the Circuit. That seems to be the authority from other circuits.

THE COURT: I gather, Mr. Jacobson, that, at least before the panel, you did not challenge the concept that there are in bankruptcy prudential considerations such as the consummation or substantial consummation of a reorganization plan short of what we would call constitutional mootness but which one of my colleagues may have called prudential mootness, but which in this opinion we call prudential consideration. Is that correct?

MR. JACOBSON: That's correct, Your Honor.

THE COURT: And do you know of any circuit in the country that has held, other than application in this specific case, that has held that there is no such concept of prudential considerations that govern a bankruptcy case? What Judge Easterbrook referred to as prudential mootness.

MR. JACOBSON: I'm not aware of any Court that's rejected the concept that after confirmation, concepts of prudential mootness or equitable mootness apply.

THE COURT: So the only issue in the case is whether this is such a case, whether this is such a case and whether the other cases were an appropriate case for application of those considerations, right?

MR. JACOBSON: Yes, Your Honor.

THE COURT: And by what standard does a Court of Appeals review that?

MR. JACOBSON: Your Honor, we believe that the issues in this case where what the trustees are trying to do is to enforce the plan, rather than to negate the plan, does not implicate the criteria contained in prudential mootness.

THE COURT: But that's not the question. The question was what is our scope of review? We set out in the majority opinion, now vacated by the Court's Order, five factors that Courts have identified in reviewing whether prudential mootness is appropriate. I gather that you didn't, leave aside the dissent, but you didn't quarrel with the correctness of those five factors as a matter of law, is that right?

MR. JACOBSON: Not strictly, Your Honor. We think that the test in this circuit was that laid down by Swedeland. Is effective relief available as a practical matter under all the circumstances --

THE COURT: But Swedeland was a constitutional mootness case, wasn't it?

MR. JACOBSON: I respectfully disagree, Your Honor. Swedeland, as we pointed out in our brief, was both a statutory and prudential mootness case.

THE COURT: Well, they use those terms but they also cited as to the criteria of the precedent, Church of Scientology, which is the Supreme Court's Church of Scientology, which is a constitutional Article Three mootness, isn't it?

MR. JACOBSON: Well, Your Honor, footnote four I believe in Swedeland -- pardon me, footnote five specifically says that we have no reason to make a separate constitutional

analysis of the District Court's decision. So I submit, Your Honor, that in Swedeland this Court based its standard of mootness on only statutory and prudential grounds.

THE COURT: Mr. Jacobson, isn't it true that we're not talking about mootness at all. Indeed, Judge Easterbrook said we banish equitable mootness from the local lexicon. We ask not whether this case is moot equitably or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.

It seems to me that we're not talking, that mootness is a misnomer here. Now, if that is correct, and all we're looking on is whether it's prudent to upset the plan of reorganization at this late date, at the very least the District Court's and the panel's judgment was incorrect, because the District Court should not, when it's constitutionally moot, you dismiss. It's a justiciability issue. Here we're talking about a direct merits review as to whether it's prudent to upset the plan or reorganization at this late date. In which case what the District Court should have done was affirm -- if you're wrong and they're right, the District Court should not have dismissed as moot but should have affirmed, and the panel, if it was right, should not have affirmed the District Court's dismissal as mootness but should have vacated the District Court's Order.

I have a follow-up, this is the basis for my next question, but am I correct that the form of judgment is incorrect here?

MR. JACOBSON: Your Honor, I would not approve of the District Court affirming Judge Balick's ruling without reaching the merits

THE COURT: That's what I'm getting to. I mean it seems to me that we're not talking about mootness at all. And if we're not talking about mootness at all, but we're talking about merits review, it seems to me there are two critical questions. One of them is the question Chief Judge Sloviter asked about is what is the scope of review. Because if it's merits review, is it -- you don't have the plenary review of constitutional mootness decision, is the review plenary or is it

abuse of discretion review. And secondly, whatever it is, is it then necessary to get into more of the merits than well, Judge Farnan didn't get into the merits but the panel seems to have gotten into the merits under the Easterbrook rubric.

MR. JACOBSON: Your Honor, a standard in Swedeland which was not a constitutional case but a statutory prudential case was plenary review of the decision of the District Court. That's the holding of Swedeland, in banc, this Court.

Secondly, Your Honor, when Your Honor set forth the standard of whether it would be prudent to upset the plan, that assumed a fact that's not true here. Under the case law involving, if I may use the term, equitable mootness, the Court is supposed to specifically canvass the issues in the case before it. If the District Court, instead of relying on buzz words and check lists had looked at the facts, it would have seen what Continental was trying to do was itself to upset the plan. And that the Appellants, the trustees, were trying to enforce the plan. So therefore, it was not that standard that should have applied. It was not prudent to use exterior equitable consideration to refuse to enforce a confirmed plan.

THE COURT: In other words, when a reviewing court, if we're not dealing with mootness in the traditional sense, you're saying that the reviewing court has to do more than the panel did here?

MR. JACOBSON: Yes, Your Honor. And the doctrine of prudential considerations should only be used as a shield to protect a confirmed plan. It should not be used as it was here, as a sword, to use the plan of confirmation process to eviscerate particular claims. So at that threshold, the District Judge should have said to himself this is not a proper application of prudential mootness because the trustees are not trying to do something inconsistent with the plan.

THE COURT: Is there any relief, short of upsetting the plan, that either we or on remand, the Court can grant?

MR. JACOBSON: Your Honor, if we receive the relief we seek, we're not asking this Court to upset the plan one iota.

The eggs can stay scrambled, but the plan said we get a bite of the omelet and we want that bite on remand.

THE COURT: Where does money come from to pay it? I'm trying -- in other words, was there a certain kitty of administration, because if they were to be paid in full, right, some money has got to drop down somewhere.

MR. JACOBSON: The plan says five days after the claim was allowed by final Order --

THE COURT: But the claim was never allowed. Excuse me, Judge Greenberg. The whole hypothesis is, the whole hypothesis of the case was that if the claim were allowed, the investors would then have the right to pull out because there would have been more allowed administrative claims than they had anticipated. And once the claim was not allowed, then we go back to Judge Greenberg's question, where does the money come from?

MR. JACOBSON: Your Honor, the plan plainly provided, and Continental said this, interpreted itself, in response to the motion, that it's a liability of reorganized debtor. It's a contingent liability which will be paid by the reorganized debtor if and when allowed and in fact --

THE COURT: If and when allowed.

MR. JACOBSON: Yes, Your Honor. At final order.

THE COURT: So then if we remand it and there's a hearing and it's allowed, then New Cal owes the money?

MR. JACOBSON: If there's a final determination that the trustees are owed money, in effect, a judgment or an order will be entered allowing the claim, and New Cal on the basis of the plan, will be liable to pay it in full within five days.

THE COURT: Aren't we forgetting the cap? What was the cap incidentally?

MR. JACOBSON: The cap was a condition to the, one of the many conditions to the investment contract, and it would

have allowed the investors not to close if that condition was not satisfied.

THE COURT: And what was it? That the administrative expenses would not exceed what?

MR. JACOBSON: Number was never defined but the fact Continental, the balance sheet after confirmation showed $4.2 billion of administrative claims. So this claim at most would be an additional two and a half percent of all the liabilities of the reorganized company the day after confirmation.

I submit, that's not a material amount.

THE COURT: Well, help me again with, you say the trustees are seeking to enforce the plan.

MR. JACOBSON: Yes.

THE COURT: And I don't understand that. If there was a cap, if there was a limit on what the investors were willing to assume for putting in their new investment, and the trustees are seeking to go beyond that, how is that enforcing the plan?

MR. JACOBSON: Because that contract was not the plan of reorganization. The plan of reorganization is the document that's filed with the Court, that creditors vote on, that says you're in such and such a class, and you will receive such and such of your claim. The plan says that our claim would receive a treatment of being paid in full after it was allowed by final order, after all appeals were exhausted, including post confirmation. Otherwise, that provision was meaningless, if it had no effect post confirmation because the plan itself only became in effect upon confirmation.

THE COURT: You conceded, did you not, that if they allowed your claim, that would have exceeded the cap, and the Courts have found, is that not correct? The Court found that it would have exceeded the cap that the investors set in.

MR. JACOBSON: I think the Court found the negative, Your Honor. The Bankruptcy Court found that the conditions to the plan, to the investment contract were not violated,

based upon the findings that she made involving the allowance for our claim and the ALPA claim. So there's no finding that the plan would not be feasible if our claim was allowed.

THE COURT: But the Court found that if your plan, if they had, if your administrative, your so-called administrative expense had been sustained it would have allowed the investors to withdraw, is that not correct?

MR. JACOBSON: Probably implicit in the Bankruptcy Judge's findings, yes.

THE COURT: Okay.

THE COURT: Mr. Jacobson, if we vacate and remand, you may lose, might you not, on the merits?

MR. JACOBSON: I hope not, but that's possible.

THE COURT: Now, if we vacate and remand, to whom do we vacate and remand? Do we vacate and remand to the District Court or do we send it all the way back -- is there anything that should go back to Judge Balick? Is there anything more that she has to do?

MR. JACOBSON: The next issue to be resolved, Your Honor, whether by this Court or on remand, is the appeal of Judge Balick's erroneous rulings. In particular, the ruling that it was necessary to move to lift the automatic stay in order to get adequate protection, pure legal issue. Secondly, whether there was sufficient evidence before Judge Balick to support the factual finding that she made that after September 1992 there was no --

THE COURT: Judge Farnan didn't rule on that.

MR. JACOBSON: Correct.

THE COURT: What would stop any creditor in any bankruptcy case from saying I have a claim, the District Court didn't allow it, I want to hold up the entire confirmation and in response to the Court's specific request, I don't want to put up a penny to, penny security. The District Court specifically

asked, the Bankruptcy Court specifically asked you how much are you willing to put up. You don't have to put up 450 million or billion. How much do you want to put up, and you said nothing. There is no amount I can put up. What is to stop all bankruptcies now from being held up, the consummation of this, being held up by one or two creditors?

MR. JACOBSON: Your Honor, where the plan specifically provides that the liability will be assumed, this issue should never be reached. The plan was self executing. It provided for how to deal with this situation. It's only Continental that's insisting that somehow allowing our claim after confirmation would upset the plan.

And Your Honor, these are trustees of public debt. They don't have, they did not in fact have the money in the estate, in their estate, to post a bond. Are you simply going to say that an investor can pick and choose what liabilities it likes, and if it wants to litigate long enough in Chapter 11, and push it to the end of the confirmation hearing, and only then allow the possibility of appeal, that those creditors are out of luck. That's arbitrary. It encourages the worst in the bankruptcy process and it encourages debtors and investors to manipulate the Court's calendar for improper results.

THE COURT: So your answer, really is, I think it's Section 10.1, that's really, that's what you're relying on, that's the answer, that's what I think you said initially, that this, that was specifically contemplated originally that there might be a situation where the funds that were put up would be insufficient, and 10.1 specifically allows for what you can do in that event. It's not anybody coming in and saying I want to hold up the plan in the context where the original plan didn't take into account the vested interest of creditor persons in the court that might have a claim down the road.

MR. JACOBSON: That's correct, Your Honor. But we did ask for a stay out of an excess of caution, because we're aware that there's a body of case law out there that Continental intended to argue rightly or we contend wrongly, that said

if you don't get a stay it's too late. But in all candor, Your Honor, we don't believe that applies.

THE COURT: If you wanted your planes back, couldn't you have just moved the Court at any time in the proceeding for lifting the automatic stay?

MR. JACOBSON: Yes, we did.

THE COURT: At what point?

MR. JACOBSON: We did it in August of 1992, and the Bankruptcy Judge ultimately denied it, on the date of confirmation --

THE COURT: But you didn't press it in the intermediate period?

MR. JACOBSON: We didn't move to lift stay before that time, yes.

THE COURT: Thank you. Your time is up, thank you.

MR. SCHIFTER: May it please the Court, I'm Richard Schifter appearing on behalf of Continental Airlines.

Your Honor, the first issue for this Court to address is whether there are circumstances where equitable considerations make it appropriate for an Appellate Court to decline to review an order confirming a plan or reorganization. In other words, is this Circuit prepared to adopt the doctrine of equitable mootness or prudential discretion not to review a confirmation order which has been adopted by every other circuit to consider the issue?

There are, we submit, fundamental bankruptcy policy considerations in favor of adoption of such a principle, and indeed make it imperative. In order to allow the bankruptcy proceedings to reach the stage of finality which allow investors to acquire assets, which is one of the objectives of the bankruptcy code to maximize value of the estate, it is necessary to have some doctrine which allows parties to rely upon an unstayed confirmation order.

It is for this reason, and the reasons enunciated by the majority in the panel decision which has been vacated, that every circuit to consider the question has in fact adopted the doctrine.

Now, dwelling on this basic point, because there is a single issue in which I disagree with the majority opinion and the panel, and that's the statement that the dissent does not disagree with that concept. With all due respect, although Judge Alito did not specifically say he rejected the equitable mootness doctrine, he established a standard which as a practical matter is a total rejection of the doctrine. All parties agree that one component of the analysis as to whether this doctrine should apply is whether the parties reasonably relied upon the unstayed confirmation order. According to Judge Alito, as he would interpret the standard, that this provision or element of the standard is only satisfied if there's 100 percent certainty that the appeal will be dismissed as moot and the decision will not be reversed subsequently. If you do not have a hundred percent certainty, then you don't have sufficient reliance to warrant implication of the doctrine.

He goes on to say, however, that a hundred percent reliance that the decision won't be disturbed is unreasonable. And therefore, by definition, you never have reasonable reliance.

Judge Alito's concerns seem to focus principally on the fact that the doctrine gives rise to unreviewability of Bankruptcy Court decisions. We submit that that is not in fact the case. That there is an opportunity for review and there was in this case. The first instance, there is the appeal to the District Court where you seek a stay of the confirmation order. Second, where that stay is denied, there is review in the Court of Appeals. We disagree with Mr. Jacobson, mandamus is not the way for review, it is simply a stay application before a single judge. If at both levels it is not necessarily the case that a bond for the full amount of the investment will ultimately be required by a court and that a bond can be tailored to deal with the particular circumstance.

There certainly have been situations where a court may stay for a matter of days or a couple of weeks a confirmation order to allow for review and thereby require a bond of lower magnitude. Alternatively, our courts have also issued limited stays where simply a particular component of the plan may be enjoined but otherwise allow for confirmation and consummation of the plan of reorganization.

For example, the basic issue here is the priority of the trustees' claim. In other words, they're saying they're entitled to be paid ahead of the other unsecured creditors. Well, one form of relief could have been simply to stay the distribution that was otherwise going to the unsecured creditors so that there would be a pot at the end of the day to allow their claim to be paid. That would have allowed the investors to go forward, knowing that the investment could be made and New Cal would not be subject to the liability but the parties who ultimately should bear the burden of an administrative claim if it would be allowed could.

In any event, the point being that although some review is possible of Bankruptcy Court decisions in this context, it is concededly a more limited review, but that frankly is a consequence of the doctrine which all the other circuits have recognized, and have been willing to accept in light of the policy considerations that are furthered by the doctrine. Now, to understand the application of these principles to this case, I'd like to review the facts in a little bit more detail. As the Court is aware, in November of 1992, after being in Chapter 11 for two years, Continental entered into an investment agreement with a group of investors similar to which they committed to invest $450 million in exchange for approximately 65 percent of the common stock of the reorganized entity. Cash was necessary, in part to fund, administrative claims that would have to be paid upon confirmation, and also to provide working capital necessary to run the airline on a going forward basis. The investment agreement is replete with provisions that govern the cash that would be in Continental at the time of Continental's emergence from Chapter 11. It was recognized that there was going to be a significant time gap between the

entering into the investment agreement and the ultimate consummation and the investors wanted to make sure that they were getting what they bargained for. One of the provisions was that there would be a limit on how much of their $450 million in cash would be used to pay administrative claims because they wanted to make sure that the balance of the cash was there available to run the airline.

So accordingly one of the provisions of the investment agreement was a requirement that Continental seek an Order through the Bankruptcy Court establishing a bar date for filing an administrative claim so this could all be sorted out prior to confirmation. There were in fact after that process three, essentially three claims that were of concern to the investors. One was a former Eastern Airlines estate, the second was a group of pilots, former Eastern pilots who in the aggregate were claiming $6 billion in administrative claims, and the third was the claim of the trustees.

Now, there were obviously hundreds of other administrative claims of smaller dollar amount that were not at issue, and the investors were not insisting that every single one of those claims be determined prior to confirmation. Indeed, there was a provision provided for in the plan that could allow for litigation of the thousand $100,000 claims and ultimately provide for payment by the reorganized entity after confirmation, if in fact that's the time it took to get these claims resolved.

At this time in approximately January of 1993, before its claim had been adjudicated, the trustees filed a motion requesting a deposit of $119 million, that that be set aside to pay their claim. The position Continental took at that time was hey, this claim hasn't been resolved. If in fact it is not resolved prior to confirmation, then yes, it will be assumed by the reorganized entity. That was the theoretical position at that time. It wasn't known at that stage how close Continental would be to the cap, what the issue would be, but that was generally provided that with respect to unresolved claims that would be assumed.

Now, what happened subsequently, when we got to the confirmation of the plan, it was then clear that the total magnitude of administrative claims was close to the maximum allowable under the investment agreement. Accordingly the investors did insist that the trustees' claim be resolved before they were prepared to put in their $450 million because if in fact they put in their $450 million and $119 million was going to go just to satisfy the trustees' claim and they had to pay the other administrative claim, they wouldn't have the cash in the company that they thought they would have at the time that they signed the investment agreement. In essence, it would have required them to put in not $450 million but $569 million to get the deal that they bargained for. That is the reason why the issue had to be addressed at the confirmation hearing. Because unless a determination was made that the claims were within the limits and accordingly that the trustees' claim was not a magnitude to exceed the limit, then the investors would not be prepared to go forward. That is the reason that it was specifically provided for in the Confirmation Order.

And in fact, Mr. Jacobson objected strenuously to the inclusion of this issue in the Confirmation Order because he argued Continental will take the position then that the consummation of the plan moots his appeal and precludes him from obtaining judicial review of the issue, which is precisely the position Continental took. Continental said at the hearing we need this because the investors need the certainty that this matter is disposed of, and that's why we included it in the Confirmation Order.

And to suggest that there has somehow been an about face is simply disingenuous. Mr. Jacobson knew at the time that that was Continental's position. It was clear on the record and that was the position that was taken in every court.

Now, what happened after the Confirmation Order was entered? The trustees failed to move timely in their request for a stay. Indeed they waited six days to seek any action. They failed to post a bond of any magnitude. They failed to go to

the Third Circuit to seek further review of the stay denial, and they failed to ask the Court to provide more limited relief, such as simply asking for a stay of the distribution of stock to the unsecured creditors, which would also have given them an ability to obtain subsequent relief. What the investors did is decided to go ahead and invest the $450 million, to pay the administrative claims that were allowed and to take control of the airline and get it --

THE COURT: What provision was made then for the trustees' claims?

MR. SCHIFTER: None, Your Honor.

THE COURT: (indecipherable) all creditors?

THE COURT: In other words, they were just knocked out?

MR. SCHIFTER: That's correct. The effect of that was they had their day in Court and a determination was made that they were not entitled to administrative claim status. Let me clarify, Your Honor.

THE COURT: You know, somehow, they had -- their equipment was absolutely essential for the running of this airline, and it was used, and they claim they can prove it depreciated in value and all they got back was their equipment and in a depreciated state. And suppose they had moved for a stay and it was denied, I mean they did at one point, I mean this is really very harsh treatment of a secured creditor, isn't it?

MR. SCHIFTER: No, Your Honor, it is not. Let me clarify because there is an important factual issue underlying this. The distinction has been drawn in this case between decline attributable to use of the collateral and decline attributable to market condition, whereby whether or not the equipment is used, there's less of a demand for planes and therefore they're worth less.

The trustees have been compensated for use of the collateral during this case. That matter has been settled and it is a matter of record that they've been compensated for the use.

The way the Bankruptcy Code works is that for a secured creditor, the, if the collateral is worth more than the claim, if the planes had been worth more than $180 million there wouldn't be any problem, they would have gotten a full recovery. But, the way the code works is that when a petition is filed and a secured creditor's collateral is worth less than the full amount of the claim, the claim gets bifurcated into two pieces.

THE COURT: Right.

MR. SCHIFTER: The secured claim and the unsecured claim for the deficiency. So that when they filed, when Continental filed in December of 1990, the claim was $180 million, if the planes were at that time only worth $110 million, they would have, you know, the value of the claim, the value of planes as secured claim $110 million and $70 million as unsecured claim.

Now what the trustees are arguing is that because the value of the planes declined subsequent to the filing of the petition, they're entitled to an administrative claim, to recharacterize what would otherwise be an unsecured claim and would have to share pro rata with the unsecured creditors, that they're entitled to come ahead of unsecured creditors and be paid a hundred percent on the dollar --

THE COURT: But if there's an application for a stay, the Bankruptcy Court can say listen, this collateral may depreciate in value, and that's one of the bases then to require a deposit or to grant the relief from the automatic stay. In other words, the trustees can say listen, this thing may depreciate, we've got to liquidate this now so we can get our money for whatever it's worth. And the Bankruptcy Court can say no, I'm not going to lift the automatic stay but I'm going to require the deposit. The underlying argument you say is well, they should have made the motion for the automatic stay.

MR. SCHIFTER: Well, Your Honor, and that gets precisely into the merits issue. And it is our position in order to be compensated for the decline in value, the trustees have to

come forward and say yes, I want the planes back because I'm concerned that they will decline in value. And the Bankruptcy Court agreed with that. The Bankruptcy Court said yes, after you ask for relief from the automatic stay, you're entitled to be compensated for decline in value. But, trustees, you did not ask until August of 1992 so the issue is did the planes decline in value after August 1992.

THE COURT: But the merits are before us, aren't they? Because after all, the appeal to the panel, the whole case is before us, did raise the merits issue. It's not, I know it wasn't decided on that basis, but it is pending before this entire Court, isn't it?

MR. SCHIFTER: Well, as a matter of judicial economy, I submit that the way that these cases are normally addressed is to look first at the issue of equitable mootness or prudential considerations as to whether or not you want to evaluate the merits. If you decide that you're not going to look at the merits and allow the lower court decision to stand then you don't need to get into it, if the Court were to decide that the doctrine would not be applicable here, then I think the Court has the choice of whether it wants to remand to a lower court to address the merits already considered in the matter --

THE COURT: Mr. Schifter, is it your argument that the investors relied on the prediction that our Court would hold that this appeal was equitably moot or moot on some other basis?

MR. SCHIFTER: Judge Alito, in fairness, I think the answer is yes. I think that the issue in terms of reliance is does, did the lower Court Order in fact address and adjudicate the issue that it gave the parties some initial comfort to then take certain actions and irreparably commit to a particular position.

THE COURT: And you quarreled with my use of the statistic 100 percent certainty. But what if the investors had a letter from counsel predicting that there was, let's say, a 25 percent chance that our Court would hold that this was equitably moot. Could you still argue that it was reasonable

for them to rely on the prediction that we would dismiss the case?

MR. SCHIFTER: I think it requires an analysis that goes beyond simply a percentage prediction of likelihood of a particular result. And so I think at this stage it's not really possible for me to say whether 25 percent is sufficient reliance. I think it requires looking at all of the factors, the extent to which a claim had been adjudicated by a lower court --

THE COURT: If the key point is what it is likely that our Court will do at some future point, doesn't it come down to a matter of probability?

If there's zero percent chance, I assume the reliance wouldn't be reasonable. If there was a hundred percent chance if that were conceivable, I assume it would be reasonable. Now if there's some point in between at which the reasonable becomes unreasonable, where is it?

MR. SCHIFTER: Again, Your Honor, with all due respect, I don't think it's quantifiable because I think you have to look at numerous factors.

For example, if you take the pilots' claim of $6 billion, what degree of certainty is reasonable with respect to a claim of that magnitude, I would submit, and if in fact the conduct of the pilots was not one in which they sought a stay, then you'd say well, this was a novel issue as to whether or not these particular claims would be considered administrative claims and in this context, maybe there's only a 50/50 chance that we would dismiss the claim as moot. But given the magnitude of the claims, (indecipherable) the court would say well, you know, that it was reasonable to believe that the Bankruptcy Court's disposition of the issue was sufficient to allow you to go forward.

And I think it's -- I think it is not a proper analysis to suggest that what you do is you look solely at the issue as to the prediction of what the Appellate Court will do to determine whether there is reasonable reliance. There's a variety of factors and looking at whether in fact there was--

THE COURT: Is the Appellate Court that you're talking about the District Court or this Court, and does it matter? Because of course, the Bankruptcy Court's determination gets appealed to the District Court. And that then gets appealed to us. And I think we may have fudged it in a bit in the majority opinion that is now vacated by saying that nobody argues that they're any different.

What, where does that consideration go from your standpoint?

MR. SCHIFTER: Well, from our standpoint, the analysis is made first by the District Court. If the District Court determines that it will refrain from reviewing the merits in light of equitable considerations, then the issue for the Appellate Court, the Court of Appeals is whether that's an abuse of the discretion. So I think the standard does shift, and in fact the appellants have a higher burden when they come to the Court, but the fundamental underlying analysis I think is the same.

THE COURT: Mr. Schifter -- oh, go ahead.

THE COURT: No, I just wanted to go back to Judge Alito's question, so the response to Judge Alito would be that it did not matter which appeal you were talking about?

MR. SCHIFTER: That's correct.

THE COURT: Mr. Schifter, does not your position give incredible power to an investor in a reorganization --

(Side 1 of tape ends; Side 2 begins)

THE COURT: -- where the bankruptcy judge can be told if you allow this claim the reorganization will not take place and if you deny it your decision will not be reviewable?

MR. SCHIFTER: Well, Your Honor. I think clearly it does provide certain discretion in the Bankruptcy Court in confirming a plan of reorganization.

THE COURT: But isn't the temptation great there for the Bankruptcy Court to see all this money being made available with the threat that if this claim is allowed it will not be?

MR. SCHIFTER: Well, there are times where the courts will refuse to confirm a plan if it is in fact inappropriate treatment of a creditor's claim. And from the investors' standpoint, frankly we didn't care prior to making the investment where the money went. It was simply an issue really between the trustees and the unsecured creditors. We were going to put in $450 million, we wanted 65 percent of the company. If that meant 35 percent had to go to the trustees, you know, we didn't care. That was an issue among the various classes of creditors. But --

THE COURT: You -- well; go ahead, finish.

MR. SCHIFTER: But, if we were going to in fact invest the money, we wanted to make sure at the end of the day somebody didn't come back and say you have to pay the bill, which in fact is what the trustees are saying.

THE COURT: If their claim would have been allowed prior to the plan being confirmed, as a practical matter however, you would not have had that infusion of money?

MR. SCHIFTER: Under the terms of the investment of the agreement as written, that's correct, we'd have to go back and renegotiate some more.

THE COURT: Well, then, in effect then, the trustees got squeezed out in order to allow the plan to go forward because they couldn't have their claim adjudicated prior to confirmation. And as it were, you objected to it being stayed on appeal unless they posted a bond which was impossible for them to get up. So in effect they're between a rock and a hard place. They have nowhere to go either before or after confirmation to have their claim adjudicated.

MR. SCHIFTER: Well, no, their claim was in fact adjudicated by the Bankruptcy Court. The issue is whether they would also be allowed to have an appeal prosecuted over

several years, and the trade-off is either you deny them the right of an appellate review beyond what is provided here, unless they post some sort of bond, or you don't have to (indecipherable) Continental.

THE COURT: But the effect of it is they didn't have the ability to have judicial review of what the bankruptcy did at -- they just didn't have that because they weren't able to post a bond, and at the same time the plan of reorganization didn't allow review of it prior to confirmation of the plan.

MR. SCHIFTER: Well, they had limited review by the District Court and they had an opportunity to post a bond and Judge Farnan --

THE COURT: What review did they have in the District Court?

MR. SCHIFTER: Well, they submitted the brief on the merits and Judge Farnan reviewed it. If in fact he felt that under the circumstances it would have been appropriate to delay perhaps for a week or two to hear their claim, he has the power to do that, but he asked the trustees if they were prepared to post a bond in any amount, they said no --

THE COURT: So the effect is they had no review because they couldn't get up a bond.

MR. SCHIFTER: But we don't know how much of a bond Judge Farnan would have required because the trustees took the position that they wouldn't post anything. And what Judge Farnan said when he ruled dismissing the appeal, was that the reason that they didn't get a --

THE COURT: Well, my understanding of these proceedings where administrative claims are generally thrashed out in the Bankruptcy Court, you don't have to post any bond in the Bankruptcy Court when you have an administrative claim and you're generally allowed -- and the effect of the confirmation is to prevent appellate review of that unless they were prepared to post a bond.

MR. SCHIFTER: That's correct. And that is what an underlying concept of the equitable mootness or --

THE COURT: Equitable mootness, because you have not really addressed the majority analysis, and whether we call it equitable mootness or prudential considerations, every time you address yourself to those prior factors, it seems to come down to the dissent's position of reliance and the reasonableness of that reliance. Are you conceding that the real issue, no matter how we call it, or what we label it with is the reasonableness of the reliance?

MR. SCHIFTER: Well, in this particular case, I think the other facts, factors are not in dispute. So and there clearly has been substantial consummation. There's not a dispute as to what efforts the trustees took to get a stay, they clearly did not get a stay and --

THE COURT: Well, if that's true, if it all comes down to the reasonableness of the reliance, and you talk about the occurrence of the confirmation of the plan, so the plan is the entire plan, including the language in the plan which specifically talks about paying allowed administrative claims. And somehow we talk about the plan as though 10.1 is not part of the plan, but it is part of the plan, and if it's part of the plan which it is, how do you get the reasonableness of the reliance?

MR. SCHIFTER: Well, because I think what you have to do is read the plan in the context of the confirmation order confirming the plan of reorganization which specifically addressed the issue regarding the trustees' administrative claim. And to the extent to which there is inconsistency between the Confirmation Order and the provision of the 10.1, we submit that the Confirmation Order should govern. It was absolutely clear to all parties that it was Continental's position, and the investors' position, that the determination was going to be a final determination by the Bankruptcy Court, the investment would not be made, would on the expectation that there would still be subsequent review of that issue and liability on the part of the reorganized Continental. And I think the parties clearly recognized --

THE COURT: I can't understand that because they know that the Bankruptcy Court's decision is usually subject to review. And they say if we rely on the decision, then it isn't going to be the subject of review. And this is -- somebody said this, it wasn't much, it was only three percent or something. To us a hundred and some million looks like a lot of money, at least to me. This is a very major thing. And how can they --

MR. SCHIFTER: It's major to us, Your Honor --

THE COURT: But doesn't it get down to the philosophy? When I read the briefs I thought it gets down to the philosophy of Chapter 11 and the way it's applied, which is to reorganize the company frequently at the expense of the secured creditor who predated the bankruptcy.

MR. SCHIFTER: Well, Your Honor, it clearly is -- the doctrine is supported by the policy consideration to maximize value of debtor's estate. And if the Court were to take a position that it's not a reasonable policy, what we need to --

THE COURT: No, but there's another policy that the secured creditors have to be protected.

MR. SCHIFTER: Yes, and to the extent to which they were a secured creditor they were fully protected, Your Honor. Because they're only a secured creditor to the extent of the value of the collateral. They got their collateral back, they got that bargain. The only issue is the unsecured portion of their claim and their insistence that they be treated as an administrative claimant and get a hundred cents on the dollar with respect to their unsecured portion of the claim ahead of all other unsecured creditors.

THE COURT: How much did they get for the use of it?

MR. SCHIFTER: Your Honor, I'm afraid I don't know the, precisely what was agreed upon by the parties on that issue.

THE COURT: Mr. Schifter, you heard my colloquy with Mr. Jacobson about nomenclature here. Was a threshold of

questions of what the merits issue would have been before the District Court and us and also the form of order, what's your reaction to all that?

MR. SCHIFTER: Well, I -- as a practical matter, obviously we don't care whether it's dismissal or affirmance, as long as it's one or the other. We think dismissal is in fact appropriate whether it's couched in mootness terms or in essence a prudential decision by the Court to abstain, which in effect --

THE COURT: Well now abstention. That's a new one.

MR. SCHIFTER: It's a decision not to review the underlying merits. I don't want to get hung up on nomenclature. The practical consideration is the same. It is the Court's determination that we don't need to address the underlying merits of the appeal because --

THE COURT: Well, if it's not mootness or justiciability in any sense, are there more issues that should have been before the District Court -- of course the District Court didn't do anything.

MR. SCHIFTER: Well, the only issue it seems to me that is required to delve into the merits is simply whether this underlying claim has in fact been adjudicated, period. Not whether it was adjudicated correctly. But for example, if we were taking the position that on the Confirmation Order denied or administered, but even if the Bankruptcy Court had never ruled on the administrative claim, if let's say that hearing had gone on, hadn't reached conclusion, the Bankruptcy Judge never entered an order on that and then we were to argue on appeal that any subsequent decision should be thrown out, well then you obviously have to look and see whether there's been an underlying indication --

THE COURT: Are you making the interim argument, Mr. Schifter, that if we reversed, Continental is going to suddenly stop flying? Those of us who may have children who booked to Houston some place or other --

MR. SCHIFTER: We haven't made that argument, Your Honor. The point is that in order to effectuate relief here and provide the trustees with $119 million, that would fundamentally change the benefit of the investors' bargain. In essence it's the same thing as requiring them to put in, as I said, an extra $119 million instead of $450 and in order to do that fairly, what you have to do is say okay, let's unwind the whole thing and give the investors back their $450 million. That obviously as a practical matter cannot be done without dismantling the whole carrier.

And so, to that extent, a decision by this Court to give the trustees relief, if in fact they want to do that, make sure it was fair to everybody, would essentially require dismantling of the airline --

THE COURT: Didn't the investors come into that with their eyes open? Didn't they know that this was an open matter subject to review?

MR. SCHIFTER: Well, if what you're asking me were the investors a hundred percent certain that this wouldn't be subject to review --

THE COURT: Yes.

MR. SCHIFTER: -- I would conceive --

THE COURT: What percent were they aware that it would be subject to review?

MR. SCHIFTER: Oh, what I'd have to say is that they were aware that every Circuit Court that has considered the issue, has in fact adopted the doctrine of mootness, and it felt that under these circumstances, where there had been a full adjudication of the underlying issue on the merits in the Bankruptcy Court that --

THE COURT: Is there a letter from counsel advising the investors of that in the record of this case?

MR. SCHIFTER: No, there's not.

THE COURT: They also know you never know what a court will do with a case.

MR. SCHIFTER: That's correct.

THE COURT: Okay, with that, we will thank you and pick up the rebuttal from Mr. Jacobson.

MR. SCHIFTER: Thank you.

MR. JACOBSON: Your Honors, we would not be here today if we had obtained the deposit that we asked for. Just like the unsecured creditors under the plan had a reserve set aside that their stock would be held until all claims were resolved and a pro rata distribution would be made, we should have gotten that 100 percent cash deposit.

Continental told the Bankruptcy Court there was no need to do that, no need to tie up the cash, because we were protected.

THE COURT: Is the deposit issue really before us? I mean this is just a complaint that you have of how you were dealt with in the lower court, but what can we do now about the deposit issue?

MR. JACOBSON: The Court could grant effective relief of requiring Continental to post a deposit now. And Continental's present financial condition happens to be very good. It has $657 million --

THE COURT: Is it the same Continental that would be posting a deposit now, the same Continental that as the Continental that now exists?

MR. JACOBSON: Yes, because had the deposit been posted, had we lost, the money would have gone back to this reorganized --

THE COURT: To Continental.

MR. JACOBSON: They succeeded to the rights of prepetition Continental.

Your Honor, secondly, the -- I think it can't be gainsaid that we were treated differently than the other administrative creditors. There is no distinction that Mr. Schifter was alluding to that only administrative claims of under $100,000 could be adjudicated post-petition and the big ones had to be knocked out by the Bankruptcy Court on the last day of the confirmation hearing. The plan doesn't make any such distinction. We were singled out. They told the Bankruptcy Judge you don't disallow this claim, Continental is not going to come out of Chapter 11. So, if you want it to come out of Chapter 11, you've got to disallow the claim. That's what happened. And that was unfair.

THE COURT: Are you saying that there was a connection with the adjudication on the merits, the merit determination of the Bankruptcy Judge and the practical consequences?

MR. JACOBSON: Your Honor, I would ask you to read from the transcript beginning at page 1400 where there's a dialogue between Continental's counsel and Judge Balick, and if it's not explicit it --

THE COURT: It would seem that the Bankruptcy Court could never make a determination of the creditors' right on the theory that even though the creditor is entitled to it, we're going to disallow it because it will mess up the plan. You can't adjudicate --

MR. JACOBSON: I respectfully submit that's what happened here, Your Honor. The reality in this case is that is what happened. That's why you have a rather bizarre decision by the Bankruptcy Judge as to why the claim was disallowed. And that, we want you to review that, and we submit this Court can do it.

THE COURT: What was bizarre about it?

MR. JACOBSON: What was bizarre is that it created a standard that nowhere exists in almost 20 years of jurisprudence under the Bankruptcy Code, that you have to move to lift a stay, that simply moving for adequate protection under 363 is not sufficient. And that rule would require every

secured creditor on the first day of every bankruptcy case to come into Bankruptcy Court and move to repossess the equipment. That would be futile because Bankruptcy Judges want to give companies a chance to reorganize. They're not going to yank their necessary operating capital immediately. But that's what that decision would require.

It's also illogical because under the plain terms of Section 363, the Bankruptcy Court can prohibit the use of the equipment for lack of adequate protection. And that gives the creditor statutory right to seek adequate protection under 363. The creditor doesn't have to come in and say give it back to me. You come into the Bankruptcy Court at the beginning of the case and say Judge, they want to use it, they have to pay for it. If they don't want to use it they can abandon it, we don't have to move to repossess it.

THE COURT: Thank you very much.

MR. JACOBSON: Thank you.

(Matter concluded)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 94-7748

IN RE CONTINENTAL AIRLINES:

NATIONSBANK OF TENNESSEE, N.A., f/k/a NationsBank of Tennessee, as Collateral Trustee under a Secured Equipment Indenture and Lease Agreement dated March 15, 1987 ("NationsBank"); NEW JERSEY NATIONAL BANK, as successor by merger to Constellation Bank, N.A., f/k/a National State Bank of Elizabeth, N.J.; HARRIS TRUST AND SAVINGS BANK; and BOATMAN'S FIRST NATIONAL BANK OF OKLAHOMA, as First, Second and Third Priority Secured Equipment Certificates Trustees thereunder, respectively (the "Series Trustees" and, collectively with NationsBank, the "Trustees"),

Appellants

Present: SLOVITER, *Chief Judge,* BECKER, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, LEWIS, McKEE and SAROKIN, and SEITZ*, *Circuit Judges*

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

O R D E R E D that the Clerk of this Court vacate the panel's opinion and judgment dated February 7, 1996, and list the above case for rehearing in banc on May 14, 1996.

By the Court,

/s/ Dolores K. Sloviter

Chief Judge

Dated: March 27, 1996

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* as to panel rehearing only.

Filed February 7, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7748

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NATIONSBANK OF TENNESSEE, N.A., f/k/a NationsBank of Tennessee, as Collateral Trustee under a Secured Equipment Indenture and Lease Agreement dated March 15, 1987 ("NationsBank"); NEW JERSEY NATIONAL BANK, as successor by merger to Constellation Bank, N.A., f/k/a National State Bank of Elizabeth, N.J.; HARRIS TRUST AND SAVINGS BANK; and BOATMAN'S FIRST NATIONAL BANK OF OKLAHOMA, as First, Second and Third Priority Secured Equipment Certificates Trustees thereunder, respectively (the "Series Trustees" and, collectively with NationsBank, the "Trustees"),

Appellants

On Appeal from the United States District Court
for the District of Delaware
C.A. No. 93-195-JJF
(Bankruptcy Nos. 90-932 through 90-984)

Argued September 15, 1995

Before: SLOVITER *Chief Judge,* ALITO and SEITZ,
Circuit Judges

(Filed February 7, 1996)

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OPINION OF THE COURT

SLOVITER, *Chief Judge.*

INTRODUCTION

Before us is an appeal by NationsBank of Tennessee (Collateral Trustee) and New Jersey National Bank, Harris Trust and Savings Bank, and Boatman's First National Bank of Oklahoma (First, Second, and Third Priority Secured Equipment Certificate Trustees), who are collectively referred to in this opinion as the "Trustees," from the order entered by the district court in the Chapter 11 bankruptcy proceeding of Continental Airlines, Inc. dismissing as moot three appeals by the Trustees. Those appeals were from orders of the bankruptcy court which 1) denied the Trustees' Renewed Motion for adequate protection, 2) confirmed Continental's revised second amended joint plan of reorganization, and 3) denied the Trustees' motion for the establishment of a cash deposit of $123,479,287. In essence, the Appellant Trustees seek payment for an asserted administrative claim of approximately $117 million against the reorganized company. The Appellee, Continental Airlines, Inc., defends the district court's mootness ruling and argues, in the alternative, that the underlying rulings of the bankruptcy court were correct as a matter of law and fact.

I.

FACTUAL AND PROCEDURAL HISTORY

Continental filed its Chapter 11 bankruptcy petition on December 3, 1990. Appellant Trustees serve as successor Collateral and Series Trustees for certificate holders who had provided Continental with operating capital. The certificates were secured at the time of Continental's petition by a pool of 29 commercial aircraft with engines, and 81 additional jet engines which, we were advised, serviced about one-third of Continental's operating fleet. Under the Bankruptcy Code, the debtor in possession, which has most of the rights, powers,

functions and duties of a trustee, *see* 11 U.S.C. § 1107(a), "may use property of the estate in the ordinary course of business without notice or a rehearing." 11 U.S.C. §363(c)(1).

Section 363(e) provides:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used . . . by the [debtor in possession], the court, with or without a hearing, shall prohibit or condition such use . . . as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e).

On February 21, 1991, First Fidelity Bank of New Jersey, predecessor to NationsBank as Collateral Trustee, filed a motion along with many other aircraft lessors and financiers alleging, *inter alia,* a decline in the value of the collateral and seeking adequate protection under section 363(e). First Fidelity later withdrew from this motion, but on June 28, 1991 it, and the predecessors of the other Appellant Trustees, filed a motion seeking similar relief. The bankruptcy court held an evidentiary hearing on the motion from September 3 through September 6, 1991 limited to the Trustees' assertion that they were entitled to adequate protection payments as a result of the collateral's post-petition decline in market value.

Continental argued, *inter alia,* that because the Trustees had not filed a motion for relief from the automatic stay, they were not entitled to an award of adequate protection under section 363(e). The bankruptcy court ruled on the Trustees' motion on August 27, 1992, rejecting that argument but finding as a fact, based on the "Blue Books," a publication issued by a company that appraises aircraft, that the market value of the collateral had not declined during the period at issue in the motion. *In re Continental Airlines, Inc.*, 146 B.R. 536 (Bankr. D. Del. 1992) [hereinafter *Continental I*].

On August 14, 1992, approximately two weeks before the opinion in *Continental I* was issued, the Trustees filed a motion under section 362(d) of the Bankruptcy Code to lift the

automatic stay ("Lift-Stay Motion"). *See* 11 U.S.C. § 362(d). This section permits a creditor to move for relief from the automatic stay of delineated activities, such as repossession of collateral, effected by section 362(a) of the Bankruptcy Code.

On September 14, 1992, the Trustees also filed a renewed motion for adequate protection for alleged decline in the collateral's value for the period after September 1991, when the original 1991 motion was argued ("Renewed Motion"). There were various hearings on the Renewed Motion between November 3, 1992 and February 5, 1993. Toward the end of that period, the Trustees filed a motion dated January 29, 1993, asking the bankruptcy court to establish a cash deposit of some $123 million, of which $117 million was attributable to alleged market decline, to preserve what the Trustees claimed was the administrative priority status of the Trustees' adequate protection claim if Continental emerged from bankruptcy as a reorganized debtor ("Deposit Motion").

During this period efforts to reorganize the debtor continued. On November 9, 1992 Continental entered into an Investment Agreement under which the Investors (Air Partners, L.P. and Air Canada) agreed and committed to an investment of $450 million in the reorganized entity under a complex arrangement and subject to certain conditions. App. at 391 *et seq.* One of those conditions relevant to this proceeding was a limitation on the amount and nature of liabilities and administrative expense claims required to be assumed by or attributable to the reorganized company. App. at 408. On January 13, 1993 Continental filed a second amended joint plan of reorganization ("Plan") which referenced that Investment Agreement. The Plan provided, *inter alia,* for assumption of "allowed administrative claims" by the reorganized Continental. App. at 656.

The confirmation hearing was held for a number of days during the period March 16, 1993 through April 16, 1993. The parties reached a settlement on April 12 concerning adequate protection due to use and/or maintenance of the collateral by Continental, and no issue relating to use decline (the

impairment in value attributable to the use of the collateral by the debtor in possession) is before us. The parties did not settle the Trustees' adequate protection claims based on decline in market value.

At the conclusion of the confirmation hearing on April 16, 1993, the bankruptcy court denied the Deposit Motion and the Renewed Motion. In a published opinion, the court held that it was necessary for the Trustees to have sought relief from the automatic stay to be entitled to adequate protection for market value decline; that therefore the Trustees were not entitled to adequate protection due to market decline until after the date of their Lift-Stay Motion, i.e. August 14, 1992; and that no decline in the market value of the collateral had taken place since that date. *In re Continental Airlines, Inc.*, 154 B.R. 176 (Bankr. D. Del. 1993) [hereinafter *Continental II*]. Also on April 16, 1993, the bankruptcy court signed the Confirmation Order. The court made a series of detailed findings of fact and conclusions of law underlying the Confirmation Order which will be referred to throughout this opinion when pertinent.

On April 20, 1993 the Trustees filed three notices of appeal to the district court from the bankruptcy court's denial of the Renewed Motion for Adequate Protection, its denial of the Deposit Motion, and its order confirming the Plan. Two days later, the Trustees filed a motion for a partial stay of the consummation of the Plan ("Conditional Stay Motion"), but filed that motion in the district court, which referred them to the bankruptcy court. On April 26, 1993, the Trustees filed a stay request in the bankruptcy court. Because the bankruptcy judge was not available, the hearing on the motion was held the next day in the district court, which ruled that the Trustees were likely to prevail on appeal but denied the stay because the Trustees were "unable to post a bond satisfactory to the Court." App. at 1755-56. With no stay impeding implementation of the Plan which had now been confirmed, the Investors proceeded to close the transaction by making their promised investment.

On May 6. 1993 Continental filed a motion in the district court to dismiss the Trustees' appeals as moot, which the district court granted on December 30, 1993. The Trustees filed a motion for rehearing and reconsideration in light of the decision in *Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993) [hereinafter *Chateaugay II*], which the court denied. The Trustees filed a timely notice of appeal. We have jurisdiction pursuant to 28 U.S.C. § 158(d).

II.

DISCUSSION

A.

The merits issues on which the parties divide present interesting and challenging questions of first impression for this court, and some appear not to have been decided by any appellate court. The Trustees argue that neither the Bankruptcy Code nor any reliable precedent supports the bankruptcy court's holding that a creditor must file a motion to lift the automatic stay as a prerequisite to seeking adequate protection. They argue that this is a matter of law that this court can decide de novo even though the district court did not reach the issue. They further argue that the bankruptcy court's finding that there was no diminution in the market value of the Trustees' collateral after they filed their Lift-Stay Motion was clearly erroneous. Finally, they argue that the bankruptcy court erred as a matter of law in denying their motion for the establishment of a cash deposit.

Not surprisingly, Continental, as appellee, defends both the bankruptcy court's legal determination that the Trustees could not assert adequate protection claims for alleged market value decline during the period before they moved for relief from the automatic stay and its factual conclusion that there had been no substantial decline in the value of the collateral since the Lift-Stay Motion was filed. Finally, it argues that in any event the Trustees could not recover for adequate protection because the value of the collateral did not decline below its

value on the petition date, which Continental contends is the relevant measure.

We would reach these issues only if we were satisfied that the district court erred in holding that the Trustees' appeals to it were moot, a decision as to which the parties vigorously disagree. Mootness *vel non* of the appeals before the district court is closely related to, if not indistinguishable from, the question whether the appeal to this court is moot, an issue which Continental alludes to in its brief. For convenience, we will refer to mootness in the district court unless we state otherwise.

Continental does not contend that the appeals to the district court or to us were moot in the constitutional sense, implicating the case or controversy requirement of Article III, § 1. *See, e.g., Preiser v. Newkirk,* 422 U.S. 395, 401-02 (1975). This is not a situation analogous to those where the appeals became moot because the law at issue was repealed, *see Diffenderfer v. Central Baptist Church,* 404 U.S. 412, 414-15 (1972); the subject of the election campaign controversy was no longer a candidate, *see Golden v. Zwickler,* 394 U.S. 103, 109-10 (1969); or the railroad whose application for tariffs was contested withdrew that application, *see A.L. Mechling Barge Lines, Inc. v. United States,* 368 U.S. 324, 329-30 (1961).

Indeed, as the Supreme Court has recently explained, an appeal is moot in the constitutional sense only if events have taken place during the pendency of the appeal that make it "impossible for the court to grant 'any effectual relief whatever.'" *Church of Scientology v. United States,* 506 U.S. 9,__, 113 S. Ct. 447, 449 (1992) (quoting *Mills v. Green,* 159 U.S. 651, 653 (1895)). An appeal is not moot "merely because a court cannot restore the parties to the *status quo ante.* Rather, when a court can fashion '*some* form of meaningful relief,' even if it only partially redresses the grievances of the prevailing party, the appeal is not moot." *RTC v. Swedeland Dev. Group, Inc.* (In re Swedeland Dev. Group, Inc.), 16 F.3d 552, 560 (3d Cir. 1994) (in banc) (quoting *Church of Scientology,*

113 S. Ct. at 450).Thus, in *Isidor Paiewonsky Assocs. v. Sharp Properties, Inc.*, 998 F.2d 145, 152 (3d Cir. 1993), we concluded that because we could impose at least one of the remedies enumerated by the appellant, and thereby provide it "*some* effective relief," the appeal was not moot. That is not the issue in this case.

Instead, Continental invokes the broader interpretation of mootness applied in bankruptcy cases, often referred to as "equitable mootness." *See, e.g., Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038-39 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048 (7th Cir. 1993); *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co.* (In re Chateaugay Corp.), 988 F.2d 322, 325 (2d Cir. 1993) [hereinafter *Chateaugay I*]; *Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co.)*, 963 F.2d 469, 471-72 (1st Cir.), *cert. denied*, 113 S. Ct. 304 (1992); *First Union Real Estate Equity & Mortgage Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 95-96 (4th Cir. 1988); *In re AOV Indus.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986); *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 796-97 (9th Cir. 1981). Under this widely recognized and accepted doctrine, the courts have held that "[a]n appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Chateaugay I*, 988 F.2d at 325.

In a trenchant discussion of the issue in a recent decision of the Seventh Circuit, the court noted that denominating the doctrine as "equitable mootness" is misleading. *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, 115 S. Ct. 509 (1994). Judge Easterbrook, writing for the court, stated: "[t]here is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness'). Using one word for two different concepts breeds confusion." *Id.* (emphasis in original). Thus,

although the discussions and applications of the concept of "mootness" in bankruptcy cases by that court had previously encompassed what is referred to elsewhere as "equitable mootness," *see Specialty Equip.*, 3 F.3d at 1048; *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992), the court in *UNR Industries* stated it would now "banish 'equitable mootness' from the (local) lexicon." 20 F.3d at 769. Instead, the court continued, "[w]e ask not whether this case is moot, 'equitably' or otherwise, but whether it is prudent to upset the plan of reorganization at this late date." *Id.*

These "equitable" or "prudential" considerations focus on "concerns unique to bankruptcy proceedings." *Manges*, 29 F.3d at 1038. Whether termed "equitable mootness" or a prudence doctrine, we see no reason why this court should part company with our sister circuits in their adoption of this doctrine. If limited in scope and cautiously applied, this doctrine provides a vehicle whereby the court can prevent substantial harm to numerous parties.

The Trustees have not challenged the viability of the doctrine of equitable mootness or application of prudential considerations in bankruptcy cases, nor have they cited to a case in any circuit that rejects the concept. Instead, they rely most heavily on a decision of the Second Circuit holding that even though the reorganization plan for the bankrupt LTV Corporation had been confirmed, the appeal of tax lessors challenging the plan's failure to give their claims administrative priority was not moot. *See Chateaugay II*, 10 F.3d 944 (2d Cir. 1993). Significantly, the court in *Chateaugay II* did not quarrel with the doctrine, merely its application in that case. In fact, in *RTC v. Best Prods. Co. (In re Best Prod. Co.)*, 68 F.3d 26, 29 (2d Cir. 1995), a more recent case from the Second Circuit, the court once again emphasized the language in *Chateaugay I* that even though an appeal may not be moot in the sense of Article III of the Constitution, it may be deemed moot in bankruptcy cases because of "equitable considerations."

We have generally stated that we exercise plenary review of a district court's decision on mootness. *See Northeast Women's Ctr., Inc. v. McMonagle,* 939 F.2d 57, 61 (3d Cir. 1991); *International Bhd. of Boilermakers v. Keffy,* 815 F.2d 912, 914 (3d Cir. 1987). In those cases our focus was on constitutional mootness. It is surprising, but we have not seen any discussion of our standard of review of a district court's determination that a bankruptcy appeal to it was moot for equitable or prudential reasons. Under ordinary review principles, we would review that decision for abuse of discretion. A particular case may also raise legal and/or factual issues interspersed with the prudential ones, and then the applicable review standard, plenary or clearly erroneous, would apply.

B.

Factors that have been considered by courts in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments. *See Manges,* 29 F.3d at 1039; *Rochman,* 963 F.2d at 471-72.

The foremost consideration has been whether the reorganization plan has been substantially consummated, especially where the reorganization involves intricate transactions, *see Rochman,* 963 F.2d at 473-74 (performance under plan involved "numerous complex arrangements"); *Roberts Farms,* 652 F.2d at 797 (plan involved "many intricate and involved transactions" and reversal of plan's confirmation "would knock the props out from under" such transactions and "create an unmanageable, uncontrollable situation for the Bankruptcy Court"), or where outside investors have relied on the confirmation of the plan, *see Manges,* 29 F.3d at 1039 (equitable mootness "protects the interests of non-adverse third parties who are not before the reviewing court but who have acted in

reliance upon the plan as implemented"); *UNR Indus.*, 20 F.3d at 770 ("[b]y protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate"); *Rochman*, 963 F.2d at 474 (reorganization involved $1.5 billion in financing from 100,000 sources); *Club Assocs.*, 956 F.2d at 1070 ("a number of investors, who were not parties to this case, had committed new funds to the 'reemerged Club' with the expectation of receiving a preferred return on their investments").

"Substantial consummation" is defined in the Bankruptcy Code as: "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2). In such instances, the strong public interest in the finality of bankruptcy reorganizations is particularly compelling.

The district court dismissed the appeals to it as moot based on the conclusions, set forth in its opinion dated December 30, 1993, that substantial consummation of the Plan had occurred, the Investors had already made their $450 million investment into the reorganized entity, all elements of the Plan, except distributions to the unsecured creditors, had been completed, and a reversal of the order confirming the Plan likely would put Continental back into bankruptcy. App. at 1873. The court also noted that Continental had implemented the Plan following its approval by the court because the Trustees had failed to obtain a stay.

The Trustees do not challenge that there had been substantial consummation by December 1993, when the district court dismissed the appeals as moot. They suggest that as their object is not to disturb the reorganization, but only to get payment from the reorganized Continental for their adequate protection claim measured by the market value decline of the collateral during bankruptcy, the line of cases upon which

Continental relies is inapplicable. We cannot agree, because the rejection of the Trustees' claim by the bankruptcy court was inextricably intertwined with the implementation of the reorganization. *See AOV Indus.*, 792 F.2d at 1148 (to evaluate mootness, court must "scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole"). Thus, the Trustees cannot avoid the effect of the substantial consummation of the reorganization plan so readily.

Inasmuch as Continental agrees that the issue is not constitutional mootness but prudential mootness, we may assume that even after substantial or total consummation of its reorganization, some effective relief would have been and still is available for the Trustees' claim. It is quite another matter in light of the substantial, indeed irrevocable, change in the status quo to determine that it would have been equitable for the court to reach the merits of the Trustees' claim. For the district court had before it an *unstayed* bankruptcy reorganization plan, and many courts have based their prudential decisions to decline to consider challenges to bankruptcy court orders on the ground that there has been substantial consummation of a plan of reorganization in reliance upon an unstayed confirmation order. *See, e.g., Rochman,* 963 F.2d at 475.

In *Chateaugay I,* the court noted that although the Bankruptcy Code only requires a stay pending appeal in limited circumstances, there is a procedure under Bankruptcy Rule 8005 to seek to preserve the status quo and "[t]he party who appeals without seeking to avail himself of that protection does so at his own risk." 988 F.2d at 326. And in *In re Manges,* the court observed, under the descriptive title "Halting the Runaway Train: the Motions to Stay," that "in many of the cases in which bankruptcy appeals were dismissed as moot, the appellants failed to seek a stay." 29 F.3d 1039.

Even the seeking of a stay may not be enough. The appellants in *In re UNR Industries* had sought a stay, albeit unsuccessfully, at every opportunity; nonetheless, the court

noted, "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." 20 F.3d at 770. *Accord AOV Indus.*, 792 F.2d at 1144, 1146-47.

Shortly after the confirmation of the Continental Plan, the Trustees filed an Emergency Motion for Conditional Stay of Order Confirming the Plan pending their appeal to the district court. The condition the Trustees sought in lieu of a stay was the establishment of a segregated account for $117 million, the full amount of their adequate protection claim, or alternatively at least $22 million, which they claim was the admitted decline in the value of the collateral. *See* App. at 1721. In response to the court's inquiry, they conceded that they were not willing to post any bond. The district court never required a supersedeas bond in the amount of $450,000,000, as the dissent suggests. In fact, the district court tried to ascertain the amount of bond that would be reasonable, and the Trustees' general position was that they were "merely the fiduciary of the money of their bondholders" and they suggested no lesser amount. App. at 1729.

Thus, as one of the reasons for its order denying the stay, the district court noted their unwillingness to post a bond satisfactory to the court. App. at 1756. *See, e.g., Central States,* 841 F.2d at 95 (appellant's failure to post bond to stay confirmation order basis for finding appeal moot). Because the failure to post the bond needed to get a stay permitted the consummation of the plan, this factor weighs heavily in favor of the district court's declination to delve into the merits of the Trustees' appeal.

The Trustees argue that this court has held that failure to obtain a stay does not necessarily render an appeal moot. The cases to which they refer are not apposite. In one, *In re Joshua Slocum Ltd.*, 922 F.2d 1081 (3d Cir. 1990), the issue was the narrow one of the power of the bankruptcy court to excise a paragraph from a shopping center lease. There is no indication in *Slocum* that there had been any confirmation of a plan before or during the appeal.

In the more recent case to which the Trustees refer, *Megafoods Stores, Inc. v. Flagstaff Realty Assocs. (In re Flagstaff Realty Assocs.)*, 60 F.3d 1031 (3d Cir. 1995), the appeal also presented a narrow landlord-tenant issue, i.e. the effect of confirmation of the landlord's plan on a tenant's right to pursue its appeal of the bankruptcy court's denial of its recoupment claim. In holding that it was not necessary for the tenant to seek a stay in order to pursue its right to appeal despite the confirmation in the interim, we noted the line of cases placing recoupment and setoff in a special category and stated, "although we recognize the importance of maintaining the integrity of confirmed plans from later attack, these unique circumstances permit the plan to be reopened and readjusted." *Id.* at 1036. Thus, neither *Flagstaff* nor *Slocum* addressed equitable or prudential mootness at issue here.

The Trustees argue that they had no obligation to take steps to preserve the status quo through a stay because the Plan contained "a built-in mechanism for the [post-confirmation] disposition and payment of Disputed Administrative Claims." Appellants' Brief at 10. Assuming arguendo, as Continental does in its brief, that the Plan provisions for post-confirmation payment of administrative claims to the extent they have been allowed by a "Final Order," App. at 656, 691, 1057, was applicable to a claim of the type and magnitude of that asserted by the Trustees, the availability of such a mechanism does not allay all prudential and equitable concerns. The significant fact is that the Trustees' claim was not "allowed" by the bankruptcy court before confirmation, and that such disallowance was an essential factor in the Investors' decision to proceed to close the transaction.

One of the concerns of the Investors that needed to be satisfied as a condition of their participation was that the total amount that would have to be paid for administrative claims could be distorted by a few large claims. These included, in particular, labor claims by airline pilots, large claims by Eastern Airlines, and the adequate protection claims of the Appellant Trustees. To limit their exposure, the Investment Agreement provided that the Investors' obligation to proceed

with the arrangements was subject, *inter alia,* to the payments and obligations for administrative claims being no higher than a specified amount.

The bankruptcy court found in its detailed Findings of Fact, Conclusions of Law and Order Confirming the Debtors' Revised Second Amended Joint Plan of Reorganization that there was substantial, credible and uncontested evidence that the administrative claims payable at confirmation would be within the specified limit of the cap set forth in the Investment Agreement. It found that neither the pilots' claims nor the Eastern claims was entitled to administrative priority, and that the Trustees' adequate protection claim had no value as an administrative claim. It based its statutorily required determination that the Plan was feasible, *see* 11 U.S.C. § 1129(a)(11), in part on these findings. App. at 1548-53.

High on the list of prudential considerations taken into account by courts considering whether to allow an appeal following a consummated reorganization is the reliance by third parties, in particular investors, on the finality of the transaction. *See Manges,* 29 F.3d at 1039 ("[t]he concept of 'mootness' from a prudential standpoint protects the interests of non-adverse third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented"); *Rochman,* 963 F.3d at 474-75 (similar). It seems to be uncontested that if the Trustees' claims at issue here had been approved as administrative claims, the total such claims would have greatly exceeded the cap specified by the Investors for that purpose. This would have given the Investors the option to withdraw; such withdrawal would have placed the entire Plan in jeopardy.

The district court specifically found, in dismissing the Trustees' appeals as moot, that the Investors had relied on the bankruptcy court's order and that there was an integral nexus between the investment and the success of the Plan. The court stated, "[t]he Investors relied on the unstayed Confirmation Order in making the $450 million investment in Continental's Plan. It is clear that [the Trustees'] requested relief [a deposit

of $22 million to $117 million for that administrative claim] would undermine the grounds which the Investors relied upon in making their investment and would require a dismantling of the entire Plan." App. at 1874. Although the Trustees argue that this finding is erroneous, there is support for it in the record.

At the hearing in April 1993 before the district court on the Trustees' request for the conditional stay of the Confirmation Order, counsel for the Trustees stated they had testimony that "as a matter of business judgment, it would be extremely unlikely for the investors to walk away from this deal if . . . a 22-million-dollar deposit was established." App. at 1727. The Trustees' counsel in effect challenged the Investors to assert otherwise, stating that inasmuch as the Investors' counsel were in court they could correct any assertions that he made. *Id.* Thereafter, the Investors' attorney rose "to make clear the [I]nvestors' position, which is that if the relief is granted to [the Trustees] which they seek from the Court this morning [the stay conditioned on a deposit of some $22 million to $117 million], then we are not prepared to close the transaction." App. at 1744.

The representative of the Investors explained that in the airline business "there is a great sensitivity to cash and the capital structure of a reorganized entity," and that the relief that the Trustees sought "could significantly impair the capital structure that would exist with respect [to] this reorganized airline." *Id.* at 1744-45. He reviewed the negotiations that had occurred for the cap for administrative expense liability, advised that the Investors had monitored on a monthly basis Continental's performance in that respect, explained that the Investors had insisted that the confirmation order address the issue of the Trustees' claim "because we want to make sure if we are putting our money in, we are getting the benefit of our bargain, which is a reorganized entity with a capital structure that we contemplated." App. at 1746. He concluded by stating unequivocally that if a stay were entered conditioned upon the bond the Trustees sought, then his client "would not be prepared to close this transaction." *Id.* The Trustees' counsel did

not thereafter argue that the Investors' counsel's statements were insufficiently probative, and therefore that suggestion here is less than persuasive.

In response to this evidence of reliance, the Trustees now argue that when the Investors closed the transaction they were aware that they were taking a risk that the Trustees would be successful on appeal on the law or facts supporting their claim. The record shows, however, that all parties were well aware of the extensive legal precedent dismissing as moot appeals from unstayed consummated reorganizations. *See* App. at 410 (references in the Investment Agreement); App. at 1729-30, 1741 (argument before the district court on the stay). In light of the long line of cases that recognize the prudential considerations that militate against upsetting expectations that formed an integral part of a complex reorganization, we decline to hold that the Investors were unreasonable in proceeding with their investment in reliance on the confirmation order. By the time the district court ruled, it was no longer possible to restore the parties to their earlier positions because the investment had been made, and the option to withdraw because the administrative claims exceeded the cap was no longer available to the Investors. *See Specialty Equip.*, 3 F.3d at 1049 (claim held moot when its acceptance "would amount to imposing a different plan of reorganization on the parties").

The Trustees have not presented us with any arguments, other than the availability of the post-confirmation mechanism for administrative claims, which would weigh against all of the prudential considerations that dictate that this consummated reorganization must be left in place. Following confirmation, Continental was operating as a restructured company, and had entered into countless new relationships and transactions. To convince a court to take the action sought by the Trustees which would undermine the basis for the Investors' decision to proceed, the Trustees would have to proffer a powerful reason indeed. They have not even attempted to do so.

Our dissenting colleague does not disagree with the concept, unchallenged by the Trustee and universally accepted elsewhere, that equitable considerations may make it imprudent to upset a consummated reorganization plan. Nor do we understand the dissent to take issue with our identification of the five considerations relevant to application of that doctrine, by whatever name it is denominated. Instead, the dissent merely disagrees with application of that doctrine in this case, based on the dissent's view that the Investors factored the possibility of a reversal into their investment decision, and the dissent's "serious doubt" that the Investors banked on the 100% probability that the Trustees would recover nothing. Record support for the dissent's view has not been given, and the district court, which was far closer to the parties and the events than we are, made a finding that there was such reliance by these Investors. *See* App. at 1874. In any event, the district court did not base that finding on any "100% probability" factor, an issue the dissent has created.

Even more important, the district court reached its conclusion based on more than one consideration, principally the facts that the reorganization plan was consummated, no stay was obtained, numerous other parties have changed their positions, and numerous irrevocable transactions have since been completed as a result of the consummation of the Plan.

Without listing all of such transactions set forth by Continental in its brief, we note that among those are the distribution to unsecured creditors, the merger of 53 debtors other than Continental with and into Continental, the investment of $110 million in cash by Air Partners and Air Canada in the reorganized Continental, the transfer by foreign governments of various route authorities, and the assumption by the reorganized Continental of unexpired leases and executory contracts worth over $5.0 billion. Thus, the "key issue" really is whether the district court abused its discretion in weighing the various equitable factors. While a judge on this court might reach a different equitable balance, we are not prepared to hold that the balance reached by the district court was an abuse of its discretion.

Under the circumstances presented here, we can see no prudential considerations that would support an attempt by an appellate court, district or court of appeals, to fashion even a limited remedy for the Trustees. That would necessarily entail imposing a new debt on the reorganized company, which is a different entity than it was when this case was before the district court. Thus, we agree with the determination of the district court that the Trustees' claim was moot. We base our holding on our conclusion that it would be neither prudent nor equitable to grant the Trustees the relief they seek.

III.

CONCLUSION

For the reasons set forth we will affirm the order of the district court.

ALITO, *Circuit Judge,* dissenting:

The majority's decision in this case is disturbing. Much is at stake. The appellants (the "Trustees") have raised what the majority itself characterizes as "interesting and challenging questions of first impression for this court," some of which "appear not to have been decided by any appellate court." Maj. Op. at 7. The district court ruled that the Trustees' arguments were likely to prevail on appeal. J.A. 1755-56. The case is clearly not moot in the sense that the courts lack the ability to provide meaningful relief, and it seems obvious that the Trustees could receive at least some relief without undermining the plan of reorganization. Indeed, the plan itself contains a mechanism for providing such relief, and Continental represented in the bankruptcy court that the Trustees would be paid under this provision if their claim was allowed. Despite all this, both the district court and the majority have refused to consider the Trustees' arguments and have thus left them without a decision on the merits by any Article III court. In producing this result, the majority relies on considerations of "prudence" and "equity," but in my view such considerations weigh strongly in favor of entertaining the Trustees' arguments.

The majority begins its analysis by identifying five factors that have been considered by other courts "in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal." Maj. Op. at 11. These are: "(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments." *Id.*

In this case, however, these five factors seem to boil down to basically one, i.e., whether entertaining the Trustees' claim on the merits would upset any reasonable reliance interests. This is the essence of the third factor listed by the majority - "whether the relief requested would affect the rights of parties not before the court." The fourth factor - "whether the relief requested would affect the success of the plan" - cannot justify the majority's decision to preclude the Trustees from getting *any* relief. (Whether or not the plan of reorganization would be imperilled if the Trustees were awarded the full measure of relief that they seek - a matter of sharp dispute[1] - no one could plausibly argue that the Trustees cannot be given *any* relief without endangering the plan.) And the remaining

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[1] The district court wrote that "if the Court were to reverse the order confirming the Plan, it would likely put Continental back into bankruptcy." J.A. 1873. However, the Trustees argue:

> It is difficult to conceive how a reorganization - such as Continental's - that involved the restructuring of over *$71 billion* in debt, and resulted in shareholder equity of *$610 million*, could somehow become financially imperilled by the allowance of the Trustees' adequate protection claim . . . . Indeed, not a single shred of evidence exists in the record to indicate - or even suggest - that Continental would be compelled to dismantle its Plan or to file another bankruptcy if the Trustees were to prevail on their adequate protection claim.

Appellants' Br. at 24 (emphasis in original; citations omitted).

factors seem to be largely, if not entirely, subsumed within factors three and four.[2]

For these reasons, it seems to me that the key issue in this case is whether the investors in NewCal (the "Investors") or others reasonably relied on the prediction that the Trustees would recover nothing on their claim.[3] If they did, then it might be unfair to upset their reliance interests. If they did not, I see nothing unfair about entertaining that claim on the merits.

In considering the question of reliance, I will start with the Investors because their plight looms large in the analyses of the majority and the district court. When the Investors decided to invest $450 million in NewCal they knew or should have known that under the reorganization plan NewCal would be required to pay the Trustees' claim if it was ultimately allowed. Section 10.1 of the plan provided that NewCal would pay "Allowed Administrative Claims." **Moreover, in order to persuade the bankruptcy court to reject the Trustees' request that a cash reserve be established prior to confirmation to cover their claim, Continental argued that such a reserve was unnecessary because if the Trustees'**

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[2] As the majority seems to recognize (see Maj. Op. at 11), the first factor (substantial consummation) is important in large part because investors and others are likely to have relied on a plan once this stage is reached. In addition, I would suppose that substantial consummation also marks the point at which the policy against disturbing a reorganization plan (factor four) comes prominently into play. The same would appear to be true of the second factor (the absence of a stay) since, as the majority notes (Maj. Op. at 11-12), the lack of a stay "permit[s] substantial consummation." Maj. Op. at 11-12. And as for the fifth factor ("the public policy of affording finality to bankruptcy judgments"), if entertaining the Trustees' appeal would not upset reasonable reliance interests or undermine the reorganization, it is difficult to see why this public policy would be offended.

[3] Continental frames the central issue in similar terms, stating: "The relevant question is . . . whether providing the requested relief would inequitably injure the interests of those whose actions in reliance upon the unstayed Confirmation Order resulted in substantial consummation." Appellee's Br. at 11.

claim was allowed it would be "an Allowed Administrative Claim which would be paid in accordance with the terms of Section 10.1 of the Plan." J.A. 1039. In addition, when the Investors made their investment, the bankruptcy court's denial of the Trustees' claim was already on appeal to the district court. Under these circumstances, any prudent investor, in deciding whether to invest in NewCal on particular terms, would have taken into account the range and likelihood of possible outcomes in the Trustees' appeal, including the possibility that the appeal would be successful in whole or in part. No reasonable investor would have proceeded on the assumption that there was a 100% probability that the Trustees would recover nothing. Consequently, we would not be upsetting any reasonable reliance interests by holding that the Trustees' arguments should be considered on the merits.

In response to this argument, the majority writes:

> The record shows . . . that all parties were well aware of the extensive legal precedent dismissing as moot appeals from unstayed consummated reorganizations. . . . In light of the long line of cases that recognize the prudential considerations that militate against upsetting expectations that formed an integral part of a complex reorganization, we decline to hold that the Investors were unreasonable in proceeding with their investment in reliance on the confirmation order.

Maj. Op. at 17.

If I correctly understand this passage, its reasoning is circular. According to the majority, it was reasonable for the Investors to rely on the Trustees' losing because the Investors had a reasonable basis for concluding that if they reasonably relied on the Trustees' losing the Trustees would lose. And of course the Trustees would lose because the Investors reasonably relied on the Trustees' losing because of the Investors' reasonable reliance on the Trustees' losing as a result of the Investors' reasonable reliance ....

The plain fact is that the Investors did not act reasonably or prudently if they relied on a calculation that there was a 100% probability that the Trustees' claim would completely fail.[4] (Such reliance would have been no more reasonable than reliance on a calculation that there was a 100% probability that fuel prices would not increase or that any other contingency that might harm the company would not come to pass.) Instead, if the Investors acted reasonably and prudently, they factored into their investment decisions the possibility that the Trustees would be successful in whole or in part.[5] And the same is true of the other parties that relied on the plan. These parties, no less than the Investors, should have known that NewCal was obligated under section 10.1 of the plan to pay allowed administrative expenses and that Continental had obtained an important ruling from the bankruptcy court by representing that the Trustees' claim if allowed would be paid by NewCal under this provision.

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[4] The majority says that the "'100% probability' factor [is] an issue the dissent has created." Maj. Op. 18. However, this "factor" is implicit in the majority's reasoning. If a reasonable investor would have proceeded on the basis of the calculation that there was, let us say, a 50% probability the Trustees would ultimately recover something on their claim, then I fail to see how we would necessarily be upsetting a reasonable reliance interest by holding that the Trustees' claim had to be entertained on the merits.

[5] Although actual but unreasonable reliance interests are not relevant here, I must say as an aside that I seriously doubt that the Investors banked on a calculation that there was a 100% probability that the Trustees would recover nothing. The majority suggests that the district court made a "finding" that the Investors did so, but I am not sure that the majority has correctly interpreted what the district court wrote. The district court stated: "The Investors relied on the unstayed confirmation order in making the $450 million investment in Continental's Plan." J.A. at 1874. This may mean no more than that the Investors, in deciding to commit the $450 million, took into account the fact that the plan had been confirmed and had not been stayed. Taking these facts into account (which would certainly have been reasonable) is quite different from relying on a 100% probability that the Trustees' claim would be entirely unsuccessful. In any event, if the district court meant to say the latter, neither the district court's opinion, Continental's brief, nor the majority's opinion cites any support in the record for this remarkable "finding."

In sum, entertaining the Trustees' claim on the merits would not upset any reasonable reliance interests. Nor would the mere act of entertaining those claims imperil Continental's reorganization. If the Trustees' claim was considered and they won on the merits (by no means a foregone conclusion), any threat to the reorganization could be taken into account in framing the Trustees' relief. What the district court and the majority have done - throwing the Trustees out of court before the merits of their claim are even heard - is unjustified and unjust.

I find it ironic that the majority invokes equity to support this result. As noted, Continental argued in the bankruptcy court that the Trustees' claim, if allowed, would be "an Allowed Administrative Claim which would be paid in accordance with the terms of Section 10.1 of the Plan." J.A. 1039. Now, Continental contends that the Trustees' claim, even if valid on the merits, should not be paid under this provision. Rewarding such a *volte-face* is not my idea of equity.

I am also concerned about the implications of this decision for future cases. The majority's decision may make it imperative for appellants in cases like this to obtain stays. If these appellants must post a bond in order to get a stay, then I question whether a stay is a realistic option in reorganizations of companies like Continental.[6] And if a stay is not a realistic option in such cases, then bankruptcy judges will exercise a distressing measure of essentially unreviewable authority.

For these reasons, I respectfully disagree with the majority's decision. I would reverse the order of the district court and remand for a decision on the merits.

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[6] In this case, Continental sought a supersedeas bond in the amount of $450,000.000. *See* J.A. at 1973. If a bond of anything approaching this magnitude is required in cases of this type in order to obtain a stay, then a stay may not be realistic.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	:	
CONTINENTAL AIRLINES, INC., et al.,	:	Bankruptcy Court Case Nos. 90-932 through 90-984
Debtors.	:	
NATIONSBANK OF TENNESSEE, et al.,	:	
Appellants,	:	
v.	:	Civil Action No. 93-195-JJF
CONTINENTAL AIRLINES, INC., et al.,	:	
Appellees.	:	

O R D E R

WHEREAS, on January 10, 1994, Appellants NationsBank of Tennessee, Inc. ("Appellants") filed a Motion Requesting Rehearing of the December 30, 1993 Memorandum Opinion and Order Dismissing Appellants' Appeals as Moot (D.I. 57);

WHEREAS, on January 21, 1994, Appellees Continental Airlines, Inc. ("Appellees") filed a Memorandum in Opposition to Appellants' motion for rehearing (D.I. 60);

WHEREAS, Appellants request rehearing and reconsideration of the Court's dismissal of Appellants' appeals in light of the Second Circuit's November 29, 1993, decision in *Frito-Lay. Inc. v. LTV Steel Co., Inc. (In re Chateaugay),* 10 F.3d 944 (2nd Cir. 1993);

WHEREAS, Appellants argue that, according to the *In re Chateaugay* standard, substantial consummation of a reorganization plan does not moot an appeal if the following five factors are met:

(1) the Court can still order some effective relief;

(2) such relief will not affect the reemergence of the debtor as a revitalized corporate entity;

(3) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court;

(4) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings;

(5) the Appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from,

In re Chateaugay, 10 F.3d at 952-3 (citations omitted); *see also In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 560 (3d Cir. 1994) (holding that appeal is not moot if some form of effective relief can be granted).

WHEREAS, Appellants argue that the five factors set forth in *In re Chateaugay* can be met in this case;

WHEREAS, Appellants argue effective relief can be granted in this case by the court's determination of purely legal issues which do not require a finding of the amount of liability;

WHEREAS, Appellants argue that Appellee's reorganization will not be threatened by granting of this motion and that Appellee presents no evidence to show that an eventual award would have a catastrophic impact on its reorganization plan;

WHEREAS, Appellants argue that consideration of reliance interests of third party investors is not sufficient to moot this issue on appeal because notice and opportunity to participate in the proceedings were given to the third party interests

involved who knew of the disputed administrative claims but invested anyway in unreasonable reliance;

WHEREAS, Appellants argue that all available remedies to obtain a stay of execution of the Order were pursued with diligence;

WHEREAS, after considering all of Appellants' contentions, the Court finds that the factors set forth in *In re Chateaugay* have not been met;

WHEREAS, for the same reasons discussed in the court's December 30, 1993, Memorandum Opinion, the Court finds that effective relief can not be granted;

WHEREAS, more specifically, the Court finds that effective relief can not be granted due to the $450 million cash investment made in the reorganized entity;

WHEREAS, the Court finds that the completion of most elements of the reorganization plan by the debtor bars effective relief with regard to the instant appeal because of the likelihood that a reversal of the Order of the Bankruptcy Court confirming the reorganization plan would put Appellees back into bankruptcy;

IT IS HEREBY ORDERED this 16 day of September, 1994, that Appellants' Motion Requesting Rehearing of December 30, 1993 Memorandum Opinion and Order Dismissing Appeals as Moot is DENIED.

/s/ Joseph J. Farman Jr.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In RE:	:	
CONTINENTAL AIRLINES, INC., et al.,	:	Bankruptcy Court Case Nos. 90-932 through 90-984
Debtors.	:	
NATIONSBANK OF TENNESSEE, et al.,	:	
Appellants,	:	
v.	:	Civil Action No. 93-195-JJF
CONTINENTAL AIRLINES, INC., et al.,	:	
Appellees.	:	

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MEMORANDUM OPINION

December 30, 1993
Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is a Motion to Dismiss Appeals for Mootness filed by Continental Airlines, Inc. ("Continental"). (D.I. 20). Continental's Motion urges the Court to dismiss three separate notices of appeal in which NationsBank of Tennessee ("NationsBank") appealed: (1) an Order of the United States Bankruptcy Court for the District of Delaware confirming Continental's Revised Second Amended Joint Plan of Reorganization, as Modified ("the Confirmation Order" and "the Plan"); (2) an Order of the Court denying NationsBank's Motion for Adequate Protection; and (3) an Order of the Court denying NationsBank's Motion for the Establishment of a Cash Deposit. For the reasons set forth in this Opinion, Continental's Motion will be granted.

Continental advances four arguments in support of its Motion to Dismiss Appeals for Mootness: (1) fundamental bankruptcy policies preclude reversal or modification of a confirmation order after substantial consummation of a plan of reorganization; (2) NationsBank's failure to obtain a stay or seek relief from the Third Circuit precludes granting relief on appeal; (3) the substantial consummation of Continental's plan of reorganization cannot be undone; and (4) it would be inequitable to disappoint the investors' reliance on the plan confirmation order. (D.I. 22).

In response, NationsBank[1] argues: (1) an appeal will not be deemed moot where effective relief may be granted; (2) Continental is judicially estopped from arguing that NationsBank's appeals are moot; (3) substantial consummation does not in and of itself render an appeal of a confirmation order

[1] The Appellants in this case are NationsBank of Tennessee, National State Bank of Elizabeth, New Jersey, Harris Trust and Savings Bank, and Boatman's First National Bank of Oklahoma, N.A.

moot; (4) failure to obtain a stay pending appeal does not preclude a court from granting relief requested; (5) the "disappointment of investors" is not a basis to dismiss an appeal as moot.[2] (D.I. 30).

The United States Court of Appeals for the Third Circuit has stated that "[g]enerally, an appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting any effective relief." *In re Highway Truck Drivers & Helpers Local Union 107,* 888 F.2d 293, 297 (3d Cir. 1989) (quoting *In re Cantwell,* 639 P.2d 1050, 1053 (3d Cir. 1981)).

In deciding mootness questions regarding appeals from bankruptcy decisions, the Court must consider several factors: (1) whether "substantial consummation" of the bankruptcy plan or a comprehensive change of circumstances has occurred; (2) whether the appellant has obtained a stay pending appeal; and (3) the nature of the relief sought by the appellant. *In re United Merchants and Mfrs. Inc.,* 138 B.R. 426, 428 (D. Del. 1992). Ultimately the Court should not dismiss a case as moot if it can effectively grant relief. *In re Combined Metals Reduction Co.,* 557 F.2d 179, 187 (9th Cir. 1977).

In the instant case, the court is convinced that substantial consummation of the Bankruptcy Plan has occurred which prevents the Court from granting any effective relief. The Investors have already made the $450 million cash investment into the reorganized entity. Moreover, all elements of the Plan, except distributions to the unsecured creditors, have been completed, and if the court were to reverse the order confirming the Plan, it likely would put Continental back into bankruptcy.

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[2] In addition, Appellants made a Cross-Motion for Sanctions, in an amount to compensate them for their costs and expenses. (D.I. 30). Appellants' Motion for Sanctions will be denied because the Court finds that Continental's Motion is "well grounded in fact and is warranted by existing law . . . . and . . . is not interposed for any improper purpose . . . ." Fed. R. Civ. P. 11.

In addition, NationsBank failed to obtain a stay pending appeal because of its own choice not to post a bond. On April 22, 1993, NationsBank filed a Motion for Conditional Stay of Order Confirming the Debtors' Revised Second Amended Joint Plan of Reorganization Pending Appeal. (D.I. 2). On April 27, 1993, the court denied NationsBank's Motion for a Stay. (D.I. 14). NationsBank's failure to obtain a stay further prevents the court from now granting any effective relief. *See Combined Metals,* 557 F.2d at 189 ("the practical necessities involved in a successful reorganization require that unless an order of the bankruptcy judge or the district judge is stayed pending appeal, the trustee's acts in accordance with that order should not thereafter be subject to reversal . . . .").

Finally, public policy considerations require the granting of Continental's Motion. As stated by the United States Court of Appeals for the First Circuit:

> [A] pair of related considerations reinforces the strong presumption disfavoring an appellate remedy which would undermine the entire reorganization. First, an appellate reversal of the substantially consummated reorganization plan . . . would 'creat[e] a nightmarish situation for the bankruptcy court on remand,' . . . and make reconstructive relief extremely improbable. Second, the reversal of a reorganization plan substantially consummated in the absence of a stay of the order of confirmation would run counter to the important policy favoring finality in bankruptcy proceedings.

In re Pub. Serv. Co. of N.H., 963 F.2d 469, 474 (1st Cir.), *cert. denied,* 113 S. Ct. 304 (1992) (footnote and citations omitted).

Granting NationsBank's requested relief would run counter to the policies behind the law of bankruptcy. The Investors relied on the unstayed Confirmation Order in making the $450 million investment in Continental's Plan. It is clear that NationsBank's requested relief would undermine the grounds

which the Investors relied upon in making their investment and would require a dismantling of the entire Plan.

Therefore, for the reasons discussed, Continental's Motion to Dismiss NationsBank's Appeals for Mootness will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In RE: CONTINENTAL AIRLINES, INC., et al., Debtors.	:	Bankruptcy Court Case Nos. 90-932 through 90-984
NATIONSBANK OF TENNESSEE, et al., Appellants, v. CONTINENTAL AIRLINES, INC., et al., Appellees.	:	Civil Action No. 93-195-JJF

ORDER

At Wilmington this 30 day of December, 1993, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that:

1. Appellees' Motion to Dismiss Appeals for Mootness is GRANTED. (D.I. 20).

2. Appellants' Cross-Motion for Sanctions is DENIED. (D.I. 30).

/s/ Joseph J. Farnan Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In the Matter of	:	
CONTINENTAL AIRLINES, INC., *et al.*,	:	Case Nos. 90-932 through 90-984
Debtors.	:	Motion No. 92-258

MEMORANDUM OPINION AND ORDER

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April 16, 1993

Balick, J.

This is the Court's decision on the Motions of NationsBank of Tennessee (NationsBank or Collateral Trustee), as successor Collateral Trustee under a certain Secured Equipment Indenture and Lease Agreement, dated March 15, 1987 (the Indenture), and the National State Bank of Elizabeth, New Jersey, Harris Trust and Savings Bank and Boatmen's First National Bank of Oklahoma, N.A., as successor First, Second and Third Priority Secured Equipment Certificates Trustees under the Indenture (collectively with NationsBank, the Trustees or Movants) for Relief from the Automatic Stay and for Adequate Protection for alleged decrease in the market value of the NationsBank collateral.

NATURE AND STAGE OF PROCEEDINGS

The Movants act as trustees under the Indenture pursuant to which Continental Airlines, Inc. obtained $350 million in operating capital by causing to be issued and sold to the public three series of certificates, consisting of First, Second and Third Priority Secured Equipment Certificates. As security for repayment of the Certificates, Continental sold to the Collateral Trustee all of its right, title and interest in and to various aircraft and additional engines (the collateral).

On December 3, 1990 (Petition Date) Continental and its affiliates (Continental or Debtors) filed for relief from its creditors under Chapter 11 of the Bankruptcy Code and currently operate as debtors-in-possession under sections 1107 and 1108 of the Code. As of the petition date, the Trustees

were secured by 29 aircraft (with engines) and 77 additional jet engines.[1]

On February 21, 1991, the predecessor Collateral Trustee, First Fidelity Bank of New Jersey, N.A. (First Fidelity) joined in filing an Omnibus Motion for Order Compelling Payment of Administrative Rent Granting Adequate Protection and Fixing Time for Assumption or Rejection of Unexpired Leases (Omnibus Motion). First Fidelity subsequently withdrew from the Omnibus Motion and, on June 28, 1991, filed its Joint Motion of Collateral Trustee and First, Second, and Third priority Secured Equipment Certificates Trustees under the $350 Million Secured Equipment Indenture for Adequate Protection. That motion was tried on September 3-6, 1991, along with adequate protection motions filed by Wilmington Trust Company and The Bank of New York (First Adequate Protection Hearing). The Court bifurcated the issues relating to the collateral's value and heard evidence regarding market value decline, deferring to a later date the issues of use and maintenance decline. On August 27, 1992, this Court issued a Memorandum Opinion and Order (August 27 Decision) in which it found that the Trustees were not entitled to adequate protection due to market value decline of the collateral.

On August 14, 1992 the Trustees filed a Motion for Relief from the Automatic Stay pursuant to § 362(d)(1) of the Bankruptcy Code for failure of adequate protection and pursuant to § 362(d)(2) of the Bankruptcy Code because the Debtor lacks equity in the collateral, and the collateral is not necessary for an effective reorganization. Subsequent to the Court's August 27 ruling, the Trustees moved by motion, dated September 14, 1992, for adequate protection for market value decline from July 1991 forward and for use and maintenance decline

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[1] Pursuant to Court orders, dated June 25, 1992 and October 6, 1992, Continental abandoned to the Trustees four airframes and eleven engines. The Trustees seek adequate protection for the decline in value of this equipment through the date of its abandonment.

from the petition date forward (Renewed Adequate Protection Motion).

Wilmington Trust Company and Bank of New York also filed motions renewing their requests for adequate protection, and the Court decided to hear the Renewed Adequate Protection Motions of all three parties simultaneously and to again limit the evidence to market value decline. Prior to the conclusion of the nine-day hearing which began on November 3, 1992 and concluded an February 5, 1993, Wilmington Trust Company and Bank of New York reached negotiated settlements with Continental and withdrew from the proceedings.

Several facts were stipulated to by Movants and Continental and are relevant to the motions at issue. First, the parties agreed that the NationsBank collateral is subject to a properly perfected security interest enforceable against Continental's estate. Second, the parties agreed that Continental has no equity in the collateral as contemplated by § 362(d)(2)(A) of the Bankruptcy Code. Finally, the parties stipulated to the authenticity and genuineness of the Avitas Blue Books, published from 1990 through 1992, as established by the testimony elicited at the deposition of Donald C. Benfell of Avitas authenticating these documents.

During the hearing, evidence was presented regarding the alleged decline in the market value of the NationsBank collateral and the necessity of that collateral to an effective reorganization of Continental. Following the hearing, the parties submitted post-trial briefs addressing the issues before the Court.

CONTENTIONS OF THE PARTIES

Movants assert that the doctrine of law of the case precludes this Court from deciding certain issues previously addressed in the Court's August 27, 1992 Decision. Thus, according to the Trustees, the Court is bound by its statement that § 363(e) implies that adequate protection may be sought [independent of a motion for relief from stay]". Movants also argue the Court's reliance on the January and July 1991

Avitas Blue Books and factual finding that the market value of the aircraft contained in NationsBank's collateral, as of approximately May 1991, was as stated in the July 1991 Blue Book[2], requires the Court to be bound by that finding in its determination of the present motions.

Second, the Trustees maintain that they are entitled to adequate protection because subsequent Avitas Blue Books indicate that the market value of NationsBank's collateral has seriously declined since May, 1991. It is Movants' position that the decline in the value of the collateral aircraft has actually been steeper than is shown in the Blue Books.

Movants also argue that the stay should be lifted because Debtors have no equity in the collateral, and the collateral is not necessary for an effective reorganization of Continental.

It is Continental's position that the Trustees are not entitled to any adequate protection for market value decline before August 14, 1992, the date the Trustees filed their Motion for Relief from the Automatic Stay, and only then if the collateral declined below petition date value. Continental contends any inference to the contrary in the Court's August 27 Decision is merely *dicta,* and therefore, the issue may be revisited by the Court.

Alternatively, Debtors argue that even if the market value issue was properly raised by Movants' first adequate protection motion, Movants are still only entitled to adequate protection if the collateral declined in market value to an amount less than its value on the petition date. According to Debtors, in either cases it is only relevant whether the collateral is worth more or less now than it was on December 3, 1990.

Additionally, Continental contends that the Court's reliance on the Avitas Blue Books in its August 27 Decision does not

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[2] In its August 27, 1992 Decision, the Court recognized that the values listed in the Avitas Blue Books lag the market by two or three months. Thus, the July 1991 Blue Book reflects May 1991 values.

require the Court to rely on the Blue Books for purposes of the present motions.

Finally, Debtors argue that the collateral is necessary to its reorganization efforts because any precipitous removal of the collateral, affecting approximately one-third of its fleet, would have disastrous financial consequences to its reorganization efforts.

DISCUSSION

Preliminary to any discussion of the merits of the Trustees' motions, is a determination of whether the doctrine of the law of the case affects the Court's determination of any of the issues raised by the present motions. Under the law of the case doctrine, when a rule of law is determined at one stage of a legal proceeding, that rule should govern subsequent stages of the same proceeding. *Al Haddad Bros. Enterprises, Inc. v. M/S Agapi,* 635 F. Supp. 205, 208 (D. Del. 1986), *aff'd,* 813 F.2d 396 (3d Cir. 1987) (citing *Hayman Cash Register Co. v. Sarokin,* 669 F.2d 162, 165 (3d Cir. 1982). The doctrine is, however, "a rule that is subject to the discretion of the court applying it." *Coca-Cola Bottling Co. v. The Coca-Cola Co. (Diet Coke VIII),* 1993 WL 40311, *12 (3d Cir. (Del.)). A court's "decision to invoke the law of the case doctrine is discretionary *only* if the doctrine actually applies to the issue before the court." *Id* (emphasis added).

The first question to be addressed, therefore, is whether the Court determined in its August 27, 1992 Decision any issue presently before the Court regarding the necessity of filing a Motion for Relief from Stay in order to be entitled to adequate protection pursuant to § 362(d). In its August 27 Decision, the Court made the following statement:

> [T]he Court does not agree that adequate protection may only be sought in conjunction with a lift stay motion. While typically they are brought as alternatives, there is no such explicit requirement in the Code. In fact, the existence of section *363(e)* would

> imply that adequate protection may be sought independently (emphasis added).

Matter of Continental Airlines, Inc., 146 B.R. 536, 540 (Bankr. D. Del. 1992).

Section 363(e) provides:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, . . . the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Relying on the foregoing provision of § 363(e), this Court concluded that adequate protection may be sought under § 363(e), without filing a lift-stay motion.

The Court's August 27 Decision held that adequate protection may only be awarded from the date movants seek relief. In reaching its determination, the Court relied on the opinion of Chief Judge Lifland that a secured creditor can only receive adequate protection to the extent the collateral declined in value after the secured creditor filed its motion for adequate protection, rather than receiving compensation for all post-petition decline in value. *In re Best Products, Inc.*, 138 B.R. 155, 157 (Bankr. S.D.N.Y. 1992). This Court did not, however, address the specific question of whether a party must file a lift-stay motion in order to receive relief pursuant to § 362(d)(1). Thus, in the instant case, the question remains whether it was necessary for Movants to request relief from the automatic stay in order to be entitled to adequate protection for market value decline caused by the automatic stay.

Section 361 of the Code defines adequate protection:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by-

> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that *the stay under section 362 of this title, use, sale, or lease under section 363 of this title,* or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

In simple terms, § 361(l) provides that adequate protection is available in three contexts: 1) under § 362(d) when the imposition of the automatic stay results in a decrease in the value of an entity's interest in property; 2) under § 363(e) for a decrease in value due to the use, sale, or lease of an entity's interest in property; and 3) under § 364 when a lien is proposed to be granted on the interest of a holder of a previous lien on property.

For purposes of both the first and second adequate protection hearings, the parties agreed to bifurcate the issue of adequate protection for decline in the value of NationsBank's collateral due to use and maintenance factors from the question of adequate protection for market value decline under § 362.

Turning to § 362, the relevant provision states:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

Read together, sections 361(1) and 362(d)(1) provide that a party in interest shall be granted adequate protection *when the continuation of the automatic stay causes* that party to suffer a decrease in the value of its property interest. In other words, a party can be granted relief from the stay if his interest is not

adequately protected; if that request for relief from the stay is not granted, and the value of the collateral is declining, adequate protection may be required. *United Savings v. Timbers of Inwood Forest,* 484 U.S. 365 (1988). Thus, the Code provides for adequate protection an alternative relief to the lifting of the stay pursuant to § 362(d). Accordingly, this Court finds that it is necessary to seek relief from the stay in order for the Court to grant relief either by lifting the stay *or* requiring adequate protection for the decline in the market value of the collateral subsequent to the imposition of the stay. *In re Best Products Co., Inc.,* 138 B.R. at 155. (adequate protection in available to cover a decline in property's value from the time adequate protection in sought).

Based on the forgoing, the Court finds that since Movants did not file a Motion for Relief from Stay until August 14, 1992. Movants are only entitled to adequate protection for any decline in the market value of their collateral from August 14, 1992 forward.

During the nine-day trial, the Court heard credible expert testimony relating to the valuation of the collateral by John E. Luth, Chief Financial officer of Continental, Donald C. Benfell, Editor of Avitas Blue Books, and Clive G. Medland of Simat, Helliesen & Eichner (SH&E). Although Mr. Luth, Mr. Benfell and Mr. Medland provided conflicting testimony as to the value of the collateral at various times during the pendency of Debtors' bankruptcy, their appraisals are similar with regard to value of the collateral in August, 1992. Moreover, the three experts are in agreement that there has been no substantial decline in the value of the collateral since August, 1992. Based on this evidence, the Court finds that Movants are not entitled to adequate protection for any decrease in the market value of their collateral. Conversely, since Movants do not suffer from lack of adequate protection under § 362(d), the Court will not grant their request for relief from the automatic stay pursuant to § 362(d)(1).

The remaining question to be addressed is whether Movants are entitled to relief from stay pursuant to § 362(d)(2)

because Debtors have no equity in the collateral, and the collateral is not necessary for an effective reorganization. Based on the agreement between the parties that Debtors lack equity in the collateral, this Court need only determine whether the collateral is necessary for an effective reorganization of Continental. Debtors bear the burden of proof on this issue. *Timbers,* 484 U.S. at 376.

The Trustees submit the expert opinion of David H. Treitel of SH&E regarding the necessity of the collateral to Continental's reorganization efforts. Mr. Treitel opines that the collateral is not necessary to a reorganized Continental for several reasons. First, there is an abundance of used aircraft and additional engines available for purchase or lease. Second, Mr. Treitel contends that the lack of profits in the airline industry reflects an excess seating capacity. Consequently, a return to profitability dictates a reduction in fleet requirements. Finally, Mr. Treitel maintains that federal legislation will require airlines to reduce the number of their aircraft of the collateral type (Stage 11) by the end of 1994, and therefore, it would be practical for Continental to abandon the collateral in order to reduce the number of such aircraft in its fleet.

For its part, Continental contends it does not have the financial resources to presently abandon the collateral to the Trustees even if Continental were permitted to do so over a period of six months. According to Continental, substantial portions of the NationsBank collateral are integrated into its fleet, and any disruption to Continental's maintenance and operations programs would significantly impair its reorganization efforts. Debtors maintain that a precipitous reduction in its fleet and seat capacity would negatively impact public confidence and cripple its efforts to increase passenger revenues. Most significantly, Continental maintains that the orderly abandonment of the collateral over a period of time, in conformity with the its Reorganization Plan, is necessary to meet the financial requirements of the Air Partners / Air Canada Investment Agreement. According to the Debtors, the cash available to it at the time its reorganization is consummated will enable Continental to provide for an

orderly abandonment and, if necessary, replacement of the collateral.

Although Mr. Treitel's testimony is credible as far as it goes, the Court finds that it does not adequately address the financial constraints of the Debtors. It is the Court's opinion, based an the evidence presented by the parties, that the Debtors have met their burden of showing that the collateral is necessary for an effective reorganization because any disruption in Debtors' planned schedule of abandonment and replacement of the collateral would have a negative impact on the feasibility of the Continental Reorganization Plan. For this reason, the automatic stay will not be lifted.

CONCLUSION

Based on the foregoing determinations that 1) the Movants were not entitled to adequate protection for market value decline until they filed their lift-stay motion; 2) that the Movants are not entitled to adequate protection from August 14, 1992, to the present and 3) that the collateral is necessary for an effective reorganization of Continental, the Court finds it unnecessary to address the other contentions of the parties regarding the application of the law of the case doctrine and the value of the collateral.

By court-approved stipulation, the parties agreed that the Memorandum, Decision and Order of August 27, 1992 was to be given interim treatment. Having determined that adequate protection for market value decline cannot be provided absent a request for relief from stay, it was unnecessary for this Court to reach the valuation issue in its August 27, 1992 Decision.

An order in accordance with this Memorandum Opinion is attached.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In the Matter of	:	
CONTINENTAL AIRLINES, INC., *et al.*,	:	Case Nos. 90-932 through 90-984
Debtors.	:	Motion No. 92-258

ORDER

AND NOW, April 16, 1993, for the reasons stated in the attached Memorandum Opinion,

IT IS ORDERED THAT:

1. The Trustees' Motion for Relief from Stay is DENIED.
2. The Trustees' Motion for Adequate Protection is DENIED.

/s/ Helen S. Balick

JUDGE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	
CONTINENTAL AIRLINES, INC., *et al.*,	)	Case Nos. 90-932 through 90-984
	)	
Debtors.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONFIRMING THE DEBTORS' REVISED SECOND AMENDED JOINT PLAN OF REORGANIZATION, AS MODIFIED, UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE AND GRANTING RELATED RELIEF

Continental Airlines, Inc. ("CAL"), Continental Airlines Holdings, Inc. ("CTA") and the affiliated debtors and debtors-in-possession in these jointly-administered Chapter 11 cases (collectively, the "Debtors"), having filed with the Court the Debtors' Revised Second Amended Joint Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code, dated January 13, 1993, and having modified such Plan by Modifications filed with the Court on March 12, 1993, April 9, 1993, and on April 16, 1993 (as so modified, the "Plan"; capitalized terms used in this Order and not otherwise defined shall have the respective meanings ascribed to such terms in the Plan); and the Debtors' Revised Third Amended Disclosure Statement, dated January 13, 1993 (the "Disclosure Statement"), having been filed with and approved by the Court pursuant to an order dated January 8, 1993 (the "Disclosure Statement Order") as containing "adequate information" pursuant to section 1125 of title 11, United States Code (the "Bankruptcy Code"); and copies of (a) the Plan, (b) the Disclosure Statement, (c) a letter of the Official Committee of Unsecured Creditors in a form approved by the Court, and (d) the appropriate ballot(s) (for those Creditors entitled to vote on the Plan), having been transmitted to all Creditors entitled to receive the same pursuant to the Disclosure

Statement Order, the United States Trustee, counsel for the Official Committee of Unsecured Creditors and the Official Committee of Equity Security Holders, all indenture trustees and those parties who have filed notices of appearance in the Debtors' Chapter 11 cases pursuant to Bankruptcy Rule 2002, the Securities and Exchange Commission, the District Director of Internal Revenue for the district in which these Chapter 11 cases are pending, and the United States Attorney for the District of Delaware, all in accordance with the Disclosure Statement Order; and the Disclosure Statement Order having fixed (a) on or before 4:00 p.m. Eastern Standard Time, on February 16, 1993 or, if the Disclosure Statement and related solicitation materials were mailed to a Creditor after January 19, 1993, with respect to such Creditor, the 28th day after they are so mailed, as the last date and time by which all Ballots must be properly completed, executed, marked and received by the Debtors at one of the addresses specified for that purpose in the Disclosure Statement and in the Published Notice described in the Disclosure Statement Order, in order to be considered as acceptances or rejections of the Plan; and (b) February 23, 1993 (which date was thereafter continued to March 16, 1993, by order of the Court), at 9:30 a.m., as the time and date for the hearing pursuant to sections 1128 and 1129 of the Bankruptcy Code (the "Confirmation Hearing") to consider confirmation of the Plan and any objections thereto including, without limitation, any objection to the Disclosure Statement dealing with a confirmation issue (the "Objections"); and due notice of the Confirmation Hearing and the date by which Objections must be filed having been given and published in accordance with the terms of the Disclosure Statement Order; and due notice of the continuance of the Confirmation Hearing to March 16, 1993, having been given; and the Court having ruled at the Disclosure Statement Hearing that consideration of objections to the Disclosure Statement dealing with a confirmation issue would be deferred until the Confirmation Hearing without the need for refiling; and the Confirmation Hearing having been held before the Court beginning on March 16, 1993 and continuing thereafter on March 17, 18, 19, 25, 26 and 30, 1993 and April

7 and 16, 1993; and the appearance of all interested parties having been noted on the record; and the Court having considered all objections to confirmation of the Plan and to this Order; and upon all the record and the evidence adduced at the Confirmation Hearing (including testimony and exhibits admitted into evidence) and upon the Debtors' Memorandum in Support of Confirmation of the Plan, and upon the Affidavits submitted in support of confirmation of the Plan and upon the submissions, including affidavits and offers of proof, at the Confirmation Hearing, the arguments and representations of counsel, and all pleadings and proceedings had herein, the Court makes the following Findings of Fact and Conclusions of Law setting forth the reasons for the Court's issuance of this Order confirming the Plan, overruling the outstanding Objections, and granting the other relief provided for herein:

THE COURT HEREBY FINDS THAT:

1. On December 3, 1990 (the "Petition Date") the Debtors filed petitions for relief under Chapter 11 of the Bankruptcy Code.

2. Since the Petition Date, the Debtors have continued to operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. (a) Commencing in the Spring of 1992, the Debtors solicited many potential investors to provide funding for a plan of reorganization for the Debtors. Keane Tr. 375-76; Exhibit 18.[1] As a result of active bidding among several potential investors, on October 14, 1992, the Court, at the Debtors' request, issued an order (the "Final Bidding Procedures Order"), which, among other things, set November 2, 1992, as the deadline for submission of additional or revised bids to invest

[1] The Court's citations to exhibits admitted into evidence are designated by exhibit numbers, and unless otherwise designated, are to exhibits admitted on the Debtors' motion. Citations to the transcript of the Confirmation Hearing are designated as follows: "[name of witness] Tr. [page]."

in the Debtors and authorized the Debtors to enter into an agreement, subject to confirmation of a plan of reorganization, with the investor or investor group submitting the highest and best bid. Pursuant to the Final Bidding Procedures Order, the Debtors issued detailed bidding procedures that were followed by the Debtors and the bidding parties. The bidding was done in an arm's length fashion and in a good faith effort to obtain the highest and best offer.

(b) On November 2, 1992, the Debtors received offers only from Air Partners ("AP") and Air Canada ("AC", and together with AP, the "Investors") and from a group including MAXAIR Holdings, Inc. On November 6, 1992, the boards of directors of CTA and CAL met with representatives from AP and AC and the MAXAIR Holdings, Inc., group. Based on the value offered under each of the proposals and all the other information and facts available to the boards of directors regarding each of the proposals, including the benefits to the Debtors' Creditors, financial details, ability of the proponents to obtain the requisite financing, synergistic and similar benefits to being affiliated with another airline, and an analysis from their investment advisors, Smith Barney, Harris Upham & Co. ("Smith Barney"), the boards unanimously decided that the offer from AP and AC was the better offer and should be accepted in the best interests of the Debtors and their estates. Pursuant to the Final Bidding Procedures Order, the Debtors notified the Court on November 9, 1992 of their selection of the offer from AP and AC as the better offer. The transactions provided for by the offer from AP and AC are herein referred to as the "Financing Transaction."

(c) On November 9, 1992, CAL and CTA, on behalf of the Debtors, entered into an Investment Agreement (the "November Investment Agreement") with AP and AC, providing for the Financing Transaction, including the purchase by AP and AC or their respective assignees on the Effective Date of securities of NewCal and its subsidiary, Continental Micronesia, for $450,000,000 in cash, less investment banking fees and certain other fees.

(d) On November 9, 1992, CAL and CTA, on behalf of the Debtors, entered into an Interim Procedures Agreement with AP and AC, and the Court approved such Interim Procedures Agreement by Order dated November 24, 1992 (the "Interim Procedures Approval Order").

(e) On November 16, 1992, the Debtors filed with the Court an amended disclosure statement and an amended plan of reorganization based on the Financing Transaction.

4. On January 8, 1993, the Court approved the Debtors' Third Amended Disclosure Statement, including certain matters referred to on the record of the hearing on the adequacy of such Disclosure Statement, which matters were then reflected in the Disclosure Statement as subsequently filed with the Court and distributed to Creditors. Following entry of the Disclosure Statement Order and in accordance therewith, the Debtors distributed copies of the Disclosure Statement and Ballots to all known Creditors entitled to vote thereon, sent a notice in a form approved by the Court to known holders of Subordinated Claims and Equity Interests, sent a notice in a form approved by the Court to known holders of claims that are not impaired pursuant to section 1124 of the Bankruptcy Code (which notice dealt only with the non-impairment of, and the treatment under the Plan of, certain classes and categories of Claims, but did not deal with the allowance or disallowance of any specific claims), gave notice and caused publication of a notice of the Confirmation Hearing, the last date to file Ballots for accepting or rejecting the Plan, and to file Objections to the Plan, all as provided in said Order. The due, proper and timely taking of the foregoing actions are evidenced by the Affidavits of Madeleine de Sousa and Gerald J. Mucha, presented and admitted into evidence at the Confirmation Hearing as Exhibits 32 and 33, and by the testimony of Madeleine de Sousa at such hearing.

5. On or about January 13, 1993, CAL and CTA, on behalf of the Debtors, and AP and AC, entered into an Amendment to Investment Agreement and to Interim Procedures Agreement. The November Investment Agreement, as amended

thereby, is referred to in this Order as the "Investment Agreement." The Investment Agreement contemplates, among other things, the issuance by Continental Micronesia of the Series A Notes and the issuance by NewCal of the Series B Notes, each as defined in the Investment Agreement. The Debtors (a) after lengthy negotiations, entered into a commitment agreement pursuant to which General Electric Capital Corporation ("GE Capital") agreed to purchase (or arrange for its affiliated designees or assigns to purchase) in a single transaction Series A Notes in the aggregate principal amount of $160 million, subject to the terms and conditions set forth in the commitment agreement and in the documentation to be prepared pursuant thereto (the "Series A Note Commitment Agreements"); and (b) are negotiating to enter into a commitment agreement pursuant to which Air Canada or its designee will agree to purchase in a single transaction Series B Notes in the aggregate principal amount of $150 million, subject to terms and conditions to be set forth in such commitment agreement and in the documentation to be prepared pursuant thereto (the Series A Commitment Agreement and the agreements and documents necessary or appropriate to implement the issuance and sale of the Series B Notes are collectively referred to as the "Plan Debt Financing"). In negotiating the Plan Debt Financing, and in preparing to sell or purchase the Series A Notes and Series B Notes, the parties thereto have negotiated at arms' length and acted in good faith. The Debtors' entry into Plan Debt Financing is in the best interest of the Debtors, their respective bankruptcy estates, and their creditors.

6. On January 15, 1993, the Debtors filed their Revised Third Amended Disclosure Statement and Revised Second Amended Joint Plan of Reorganization with the Court.

7. On March 12, 1993, the Debtors filed a Modification of such Plan (the "first Modification") reflecting certain technical changes to the terms thereof, including the settlement of a number of Objections to the Plan. Exhibit 28. On April 9, 1993, and on April 16, 1993, the Debtors filed further Modifications reflecting certain further technical changes (the

"Second Modification" and the "Third Modification," respectively, and together with the First Modification, the "Modifications").

8. As set forth in the Affidavit of Ms. Madeleine de Sousa respecting the Ballots on the Plan (the "Ballot Affidavit"), filed March 25, 1993, all impaired classes have accepted the Plan in terms of both number and amount pursuant to section 1126 of the Bankruptcy Code, except for Secured Classes 9.16, 9.46, 9.48 and 9.49[2] , which have not accepted the Plan, and Classes 17 (consisting of Subordinated Claims) and 18 (consisting of Equity Interests), which will receive no distributions under the Plan and are therefore deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Accordingly, the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to all impaired classes other than Secured Classes 9.16, 9.46, 9.48 and 9.49, and Classes 17 and 18.

9. The Plan complies with the applicable provisions of the Bankruptcy Code as required by section 1129(a)(1) thereof.

10. The Debtors, as proponents of the Plan, have complied with the applicable provisions of the Bankruptcy Code as required by section 1129(a)(2) thereof.

11. The Plan has been proposed in good faith and not by any means forbidden by law as required by section 1129(a)(3) of the Bankruptcy Code.

12. In bidding and in negotiating the Investment Agreement and the Related Agreements (as defined in the

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[2] A number of other Secured Classes originally rejected the Plan. Pursuant to various Stipulations that were approved and "so ordered" by the Court during the Confirmation Hearing, and pursuant to Bankruptcy Rule 3018(a), this Court, for good cause shown, permitted the Secured Creditors in such Classes to change their votes to acceptance of the Plan, such Secured Creditors so changed their votes, and such Classes are therefore deemed to have accepted the Plan as modified pursuant to such Stipulations.

Investment Agreement) and in preparing to purchase the NewCal Common Stock, NewCal Warrants and NewCal Preferred Stock to be issued by NewCal pursuant to the Plan and such Agreements, AP and AC have acted in good faith and have complied with the procedures established by the Court, and AC has acted in good faith in arranging for the purchase of the Series B Notes.

13. Any payment made or to be made by the Debtors, or by a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with these Chapter 11 cases, or in connection with the Plan and incident to these Chapter 11 cases, shall be subject to the approval of the Court as reasonable as required by section 1129(a)(4) of the Bankruptcy Code.

14. At the Confirmation Hearing or in the Disclosure Statement, the Debtors have disclosed the identity and affiliations of the individuals proposed to serve, after the Effective Date of the Plan, as directors and officers of NewCal, the NewCal Subs, and Continental Micronesia, Inc. Exhibits 46 and 47. The continuance or appointment of such individuals as directors and to such offices is consistent with the interests of Creditors and Equity Interest Holders and with public policy, and the Debtors have disclosed the identity of any insider that will be employed or retained by NewCal or any NewCal Sub, and the nature of any compensation for such insider, all as required by section 1129(a)(5) of the Bankruptcy Code. Exhibit 46.

15. The Plan does not provide for any rate changes requiring the approval of a governmental regulatory commission, as contemplated by section 1129(a)(6) of the Bankruptcy Code.

16. The Plan has not been accepted by each holder of a Claim or Equity Interest of every class that is impaired under the Plan; however, each non-accepting holder of a Claim or Equity Interest of each such class (other than Secured Class 9.39) will receive or retain under the Plan on account of such Claim or Equity Interest property of a value, as of the Effective Date, that is not less than the amount that such holder

would so receive or retain if each Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date as required by section 1129(a)(7)(A) thereof. In making the foregoing findings, the Court finds credible the testimony of Brian Keane, which evidence establishes to the satisfaction of the Court that:

> (i) in a hypothetical Chapter 7 liquidation, as required by section 1129(a)(7) of the Bankruptcy Code (in which, by its terms, the PBGC Settlement would not apply), General Unsecured Claims would receive no recovery at all after payment of all Secured Claims and Claims of higher priority, regardless of whether such hypothetical liquidation were conducted separately for the estates of each of the 53 Debtors, for the Debtors grouped together in the four pools proposed by the Plan or for all of the Debtors substantively consolidated together into one pool; and
>
> (ii) Each holder of a Secured Claim (other than a Secured Claim in Secured Class 9.39) or a Frontier I Trust Claim which has not accepted the Plan will receive or retain under the Plan on account of such Claim property of a value, as of the Effective Date, that is not less than the amount such holder would so receive in a hypothetical Chapter 7 liquidation, as required by section 1129(a)(7) of the Bankruptcy Code, under any of the foregoing scenarios.

17. Secured Class 9.39 is the only class that has made a valid election under section 1111(b)(2) of the Bankruptcy Code. Keane Tr. 441-42. Each holder of a Claim in Secured Class 9.39 will receive or retain under the Plan on account of such Claim property of a value, as of the Effective Date, that is not less than the value of such holder's interest in the Debtors' estates' interest in the property that secures such Claim, as required by section 1129(a)(7)(B) of the Bankruptcy Code. Keane Tr. 442-43.

18. In arriving at these conclusions, Keane made detailed liquidation studies for all 53 Debtors, for the Debtors grouped together in the four pools proposed by the Plan and for one substantively consolidated estate for all Debtors. Keane Tr. 253; Exhibits 10, 11, 12, 13, and 34.

19. Keane's testimony was credible and essentially uncontested. Keane employed a reasonable methodology based upon reasonable assumptions. Keane Tr. 258-60. He made reasonable assumptions regarding the liquidation value of assets, basing liquidation values for aircraft on testimony used in prior proceedings in this Court (Keane Tr. 258-60) and values for other assets on appraisals where they were available. Keane Tr. 260. He then made reasonable adjustments to book and market values to determine liquidation values. He made reasonable assumptions about the value of intercompany claims (Rowen Tr. 936), including, among other things, the intercompany note payable by CAL to CTA (with an outstanding balance, including post-petition interest, of approximately $106 million) for which CTA claims security (the "Intercompany Secured Note") and various service arrangements between CTA, and its affiliates, and CAL (the "Intercompany Service Arrangements"). Keane Tr. 258-70. There is substantial, credible, uncontested evidence that the payments made in connection with these Intercompany Service Arrangements during these cases have amounted to at least the fair value of the goods and services provided under these contracts and that if the contracts were rejected in a liquidation, CTA would not have any administrative claims arising from the rejection. Keane Tr. 261-63. There is substantial, credible, uncontested evidence that CAL has substantial preference and equitable subordination defenses to payment on the Intercompany Secured Note. Keane Tr. 267-77; Rowen Tr. 927-32.

20. Testimony by Janice Bryant, formerly Controller of CTA, credibly described facts providing the bases for these defenses. Testimony of Robert Rowen, CAL Deputy General Counsel, described credibly, in greater detail, the legal basis

for these preference and equitable subordination defenses and the substantive consolidation of various estates.

21. Keane also made reasonable assumptions about claims against the various Debtors, based on information from CAL personnel responsible for claims administration, the CAL legal department and outside pension counsel. Based on these sources, Keane made a reasonable assumption that there would be approximately a $650 million joint and several unsecured claim by the PBGC against each of the Debtors in a Chapter 7 liquidation related to the Eastern Air Lines pension plans (Keane Tr. 282) and an approximately $78.6 million joint and several priority claim against each of the Debtors arising out of the termination of the CAL pension plan in a liquidation. Keane Tr. 283-84; Exhibits 10 and 34.

22. There is substantial, credible and uncontested evidence that in a hypothetical Chapter 7 liquidation of CTA alone there would be a deficit of approximately $69.7 million before any value would be available to its unsecured creditors (Keane Tr. 257; Exhibit 10) and in a hypothetical liquidation of the CTA pool there would be a deficit of $78.5 million before any value would be available to CTA's unsecured creditors. Keane Tr. 308; Exhibit 13.

23. Except to the extent that the holder of a particular Claim has agreed to a different treatment of such Claim (including, without limitation, such agreements relating to certain deferrals of rent and certain claims incurred in the ordinary course of the Debtors' businesses), the Plan provides, as required by section 1129(a)(9) of the Bankruptcy Code, that —

> (A) with respect to an Allowed Claim of a kind specified in section 507(a)(1) of the Bankruptcy Code (i.e., Allowed Administrative Claims, including Allowed Superpriority Claims), on the Effective Date, the holder of such Claim will receive on account of such Claim Cash equal to the Allowed amount of such Claim as required by section 1129(a)(9)(A) of the Bankruptcy Code;

(B) with respect to an Allowed Claim of a kind specified in section 507(a)(3) or 507(a)(4) of the Bankruptcy Code (i.e., Priority Wage Claims and Priority Plan Contribution Claims), the holder of such Claim will receive Cash on the Effective Date equal to the Allowed amount of such Claim as required by section 1129(a)(9)(B) of the Bankruptcy Code; and

(C) with respect to an Allowed Claim of a kind specified in section 507(a)(7) of the Bankruptcy Code (i.e., Priority Tax Claims) the holder of such Claim will receive on account of such Claim deferred Cash payments, over a period not exceeding six years after the date of assessment of such Claim, of a value, as of the Effective Date, equal to the Allowed amount of such Claim as required by section 1129(a)(9)(C) of the Bankruptcy Code.

Section 10.1(ii) of the Plan provides for the payment of any claim of a kind specified in sections 507(a)(1), 507(a)(3), 507(a)(4) and 507(a)(7) of the Bankruptcy Code, but which has not been Allowed as of the Effective Date of the Plan, on the fifth Business Day after such Claim is Allowed, or as soon thereafter as practicable. The Court finds this provision to be an appropriate means of providing for the payment of Disputed or contingent Claims asserting such priority and which have not been determined as of the Effective Date.

24. There do not exist any Claims against the Debtors of a kind specified in sections 507(a)(5) or 507(a)(6) of the Bankruptcy Code, and section 507(a)(2) of the Bankruptcy Code is not applicable in these cases.

25. The overwhelming majority of classes of impaired Secured Claims, and all classes of General Unsecured Claims and Frontier I Trust Claims, have accepted the Plan, and the Court therefore finds that at least one impaired Class of Claims has accepted the Plan, which acceptance has been determined without including any acceptance of the Plan by any

insider holding a Claim of such class, as required by section 1129(a)(10) of the Bankruptcy Code.

26. The Debtors have presented substantial and credible evidence as to the Plan's feasibility. After the extinguishment and restructuring of debt under the Plan, NewCal will have shareholder equity of approximately $610 million and cash balances of approximately $635 million as of the Effective Date. Keane Tr. 148-49; Exhibit 1 and 4. There are substantial reasons to believe that NewCal will survive in the market place. NewCal has highly productive employees and substantial cost advantages over its competitors. Keane Tr. 185; Exhibit 6 and 8. During the last year, CAL's results of operations were the second best in the domestic airline industry. Keane Tr. 189-90; Exhibit 7. CAL's yields have been below industry average (Keane Tr. 200-01) but there is reason to believe they will improve once CAL is reorganized as NewCal. Keane Tr. 201-03.

27. NewCal will have capitalization ratios measuring debt and equity within the range of other competitive airlines. Exhibit 4. NewCal will have a schedule of fixed obligations which is reduced substantially from the Debtors' pre-petition levels. Keane Tr. 154; Exhibit 2. These fixed obligations are spread reasonably over time in the post-confirmation period and there is strong reason to believe that NewCal will be able to meet them as they come due. Keane Tr. 178.

28. Finally, NewCal will have liquidity which is competitive with other major domestic airlines when measured against revenues. Keane Tr. 163-64; Exhibit 3.

29. The Financing Transaction is crucial to the feasibility of the Plan. Over half of the approximately $635 million in cash (Keane Tr. 149) which NewCal will have at the Effective Date will come from the Financing Transaction which ensures that NewCal will have adequate liquidity.

30. The Investors have relied upon the existing cost-structure of CAL and its affiliates, including their highly productive workforce, in entering into the Investment

Agreement. There is reason to believe that the Investors will close the Financing Transaction if a satisfactory order is entered confirming the Plan.

31. The Investment Agreement contains a number of conditions to closing based on various factors, including the level of administrative claims payable at the Effective Date, the level of obligations assumed on the balance sheet of NewCal, and the entry of an order providing that certain former employees of Eastern Air lines, Inc. ("Eastern") are not entitled to specific performance or other injunctive, equitable, or other prospective relief against the Debtors or NewCal. Among other things, the Investment Agreement provides that the Investors' obligations are subject to the payments and obligations referred to in the preceding sentence being no higher than certain amounts specified in the Investment Agreement. Excluding (i) the "Eastern Claims," as defined in Section 1.91 of the Plan,[3] and (ii) the claims of NationsBank of Tennessee, as Successor Collateral Trustee, for $117,000,000 of alleged post-petition decline to its collateral value (assuming a half-life maintenance condition) ("Market Decline"), there is substantial, credible and uncontested evidence that permits this Court to find, for purposes of determining feasibility, that Administrative Claims payable at confirmation will be within the limits set by the Investment Agreement. Exhibit 9, p.1 lines B2 and K.

32. In order to satisfy certain conditions to the obligations of the Investors, the Debtors have asked this Court (i) to adjudicate the priority of the Eastern Claims and the extent to which, if any, the claimants thereon are entitled to specific performance or other injunctive, equitable and or other prospective relief, which Eastern Claims include, *inter alia,* claims based upon the following matters:

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[3] *Provided, however,* that the term "Eastern Claims," as used in this Order, does not include any of the claims of Eastern's Chapter 11 estate (asserted on behalf of that estate by Eastern's Chapter 11 trustee and certain assignees) covered by the Eastern Settlement referred to in the Plan. *See* Plan §§ 1.92, 12.17.

a. *In the Matter of an Application of the Air Line Pilots Association, International for an Arbitration Under the Labor Protective Provisions Involving Eastern Air Lines, Inc.*, Kasher, Arb. ("LPP Claims");

b. *Hastings-Murtagh, et al. v. Texas Air Corp., et al.*, Case no. 86-2378-CIV-KING (S.D. Fla.);

c. *Air Line Pilots Ass'n and Copeland v. Texas Air Corp,. et al.*, Case No. 88-0804-CIV-HOEVELER (S.D. Fla);

d. *Air Line Pilots Ass'n and Copeland v. Texas Air Corp., et al.*, Adv. Pro. No. 89-5692A (Bankr. S.D.N.Y.);

e. *Gioia and Copeland v. Texas Air Corp., et al.*, C.A. No. 9500 (Del. Ch. Ct.), *removed*, No. 89-71 (Bankr. D. Del.);

f. *Vaughn, et al. v. Continental Airlines Holdings, Inc.*, et al., Adv. Pro. No. A-92-142 (Bankr. D. Del.);

g. *Tristani, et al. v. Texas Air Corp., et al.*, C.A. No. 1:90-CV-318-JTC (N.D. Ga.); and

h. Miscellaneous claims for wages, sick leave, etc. by employees of Eastern and other third party claims based upon contractual relations with Eastern;

see Exhibit 35,[4] and (ii) to adjudicate the amount of NationsBank's Market Decline Claims, if any. These adjudications are crucial to the willingness of the Investors to consummate the Financing Transaction.

33. As to the Eastern Claims, the Court finds as follows:

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[4] As stated *supra* at n.3, to the extent such claims are property of Eastern's estate (*see* Exhibit 35, Tab E) paragraphs 30 through 33 of this Order do not address or otherwise affect those claims.

A. Based on the March 25, 1993 Stipulation of the Air Line Pilots Association, International and the other parties asserting LPP Claims, as well as this Court's inherent power and discretion to follow its earlier rulings, this Court relies upon, bases its conclusions upon, and incorporates into this Order its two earlier orders dated February 11, 1993 (Appendix A hereto, incorporated herein by this reference). The Court also incorporates herein its Order executed contemporaneously herewith providing that the February 11, 1993 orders should be applied to the LPP Claims subject to the Debtors' Second Partial Objection to LPP Claims, filed on January 29, 1993 (Appendix B hereto, incorporated herein by this reference). Accordingly, this Court finds and concludes that no party has any administrative or other priority claim for any LPP Claim or any right to specific performance or other injunctive, equitable, or other prospective relief with respect to any LPP Claim; and

B. As to the other Eastern Claims, as described in Paragraph 31 and 32 above, the Court finds, based upon the evidence of record, including Exhibit 35, that all such Eastern Claims are, at best, general unsecured prepetition claims. The Court further finds that if the Eastern claims are ultimately found to be valid, such claims would give rise to a right to payment, and, therefore, such Eastern Claims are dischargeable, and are not entitled to administrative priority, and are not entitled to specific performance or other injunctive, equitable or other prospective relief. *See* Plan at § 12.16.

34. With respect to NationsBank's claim for alleged Market Decline, this matter has been fully tried and briefed and the record of that trial has been incorporated into the record of the Confirmation Hearing by order of this Court. Based on careful analysis of the facts and applicable law, which are elaborated more fully in (Appendix C hereto, incorporated herein by this reference), this Court finds and concludes that NationsBank has a claim of $_____ for Market Decline.

35. There is substantial, credible and uncontested evidence that the Debtors have satisfied, or are close to satisfying, the

various other conditions set forth in the Investment Agreement, and therefore there is a substantial basis to believe the Financing Transaction will be consummated.

36. The Debtors' most recent projections show that, with the substantial liquidity provided by the Financing Transaction, NewCal and its affiliates will be able to meet their fixed obligations under the Plan and have adequate liquidity to provide assurance of performance in the future.

37. The evidence shows that the Debtors will be able to satisfy the full amount of all Allowed Claims required by the Plan to be satisfied in the manner and at the times as provided for under the Plan. After consummation of the Plan, NewCal and the NewCal Subs will have sufficient assets and equity generated from their operations to satisfy fully all of their debts as they become due.

39. It appears that in light of the findings set forth in paragraphs 33 and 34 above, NewCal and the NewCal Subs will be able to satisfy in the manner provided by the Plan all Allowed Administrative Claims, as well as any Disputed Administrative Claims that are ultimately Allowed, as required by section 1129(a)(9)(a) of the Bankruptcy Code and by the Plan. Accordingly, based on those findings, the Court further finds that the Debtors should not be required to deposit in a segregated account any amounts that may be required to pay Administrative Claims that may be Allowed after the confirmation of the Plan.

39. The testimony of John Luth also discloses the potential purchase by NewCal from The Boeing Company and/or one or more other airframe manufacturers (together with related purchases of power plants from one or more power plant manufacturers) of new firm and option jet aircraft commencing in early 1994 for an aggregate purchase consideration, in the case of the firm aircraft, of approximately $4.0 billion pursuant to one or more purchase agreements which may be entered into, subject to certain conditions, including the effectiveness of the Plan, on or before the Effective Date (the "New Aircraft Agreements"). The Debtors have established

that such an aircraft acquisition program is financially feasible and is important to the continued growth and operational plan of NewCal.

40. In view of the foregoing, the Court finds that the Plan is feasible and that confirmation and consummation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization of, NewCal or any NewCal Sub, all as required by section 1129(a)(11) of the Bankruptcy Code, assuming consummation of the Financing Transaction.

41. All fees payable under 28 U.S.C. § 1930 have been paid, or the Plan provides for the payment of all such fees on the Effective Date as required by section 1129(a)(12) of the Bankruptcy Code.

42. Section 14.9 of the Plan provides for the continuation after the Effective Date of payment of all Retiree Benefits at the levels established pursuant to subsection (e)(1)(B) or (g) of section 1114 of the Bankruptcy Code, at any time prior to the Confirmation Date, for the duration of any period (if any) the Debtors have obligated themselves to provide such Retiree Benefits at such levels, as required by section 1129(a)(13) of the Bankruptcy Code. The Debtors have represented and advised the Court that they have not obligated themselves to continue any such Retiree Benefits.

43. The Plan does not discriminate unfairly, and is fair and equitable, with respect to each class of Claims or Equity Interests that is impaired under, and has not accepted, the Plan, as required by section 1129(b)(1) of the Bankruptcy Code.

44. Secured Classes 9.48 and 9.49, each of which is to be treated by Restructuring Treatment under the Plan, are impaired under, and have not accepted, the Plan. As to each such class, the Plan provides that, and there is substantial and credible evidence that, the holders of Claims in such class shall retain the liens securing such Claims to the extent of the Allowed amount of such Claims, that the property subject to such liens shall be retained by NewCal, and that each such holder shall receive on account of such Claim deferred Cash

payments totaling at least the Allowed amount of such claims, of a value, as of the Effective Date, of at least the value of such holder's interest in the Debtors' estates' interest in such property. Keane Tr. 439, 443, 781. Such treatment satisfies the requirements of section 1129(b)(2)(A)(i) of the Bankruptcy Code.

45. Secured Class 9.16 is impaired under, and has not accepted, the Plan. There is substantial, credible, and uncontested evidence that the holders of Claims in such class shall receive treatment under the Plan that is consistent with, and that satisfies the requirements of, section 1129(b)(2)(A)(i) or (iii) of the Bankruptcy Code.

46. Secured Class 9.46, which is to be treated by Temporary Retention under the Plan, is impaired under, and has not accepted, the Plan. As to such class, the Plan provides that the holders of Claims in such class shall receive the indubitable equivalent of such Claims in that NewCal will temporarily retain the collateral securing such claims and will abandon such collateral to the holders of such Claims over specified periods ending not later than April 1994, as set forth in Schedule 6 to the Plan. The Collateral will be abandoned in a net condition comparable to the condition of such collateral on the Effective Date, or NewCal will pay the net costs of restoring the collateral to such condition as provided in Schedule 6 to the Plan. Such holders will retain their lien on such collateral and receive commercially reasonable documentation thereof. NewCal will pay such amounts with respect to its use of such collateral after the Effective Date as specified in Schedule 6 to the Plan. Assuming a hypothetical sale of the collateral for Secured Class 9.46 at the Effective Date, these payments provide compensation which is approximately double the rate of interest which would be appropriate on a secured loan, of the proceeds of such hypothetical sale of a duration equal to the period of Temporary Retention. Exhibit 29. This provides adequate compensation for the risk imposed on the holders during the Temporary Retention period, including any compensation appropriate for the risk of decline in the value of the collateral during the period of Temporary

Retention. Keane Tr. 483. For all of these reasons, such treatment satisfies the requirements of section 1129(b)(2)(A)(iii) of the Bankruptcy Code.

47. Holders of Subordinated Claims in Class 17 will not receive or retain any property under the Plan on account of such Subordinated Claims and are deemed to have rejected the Plan. Such holders would not receive or retain any property on account of such Subordinated Claims if the applicable Debtor were liquidated under Chapter 7 of the Bankruptcy Code on the Effective Date (under any of the three possible hypothetical liquidation scenarios described above) because there would be insufficient value available in such a liquidation to satisfy all Claims which are senior in right of payment to such Subordinated Claims.

48. Holders of Equity Interests in Class 18 will not receive or retain any property under the Plan on account of such Equity Interests and are deemed to have rejected the Plan. Such holders would not receive or retain any property on account of such Equity Interests if each Debtor were liquidated under Chapter 7 of the Bankruptcy Code on the Effective Date, under any of the three possible hypothetical liquidation scenarios described above.

49. There is no class of Claims or Equity Interests junior to Class 18.

50. With respect to all classes of General Unsecured Claims and with respect to Class 17, the Plan provides that the holder of any Claim or Equity Interest that is junior to the Claims in such classes will not receive or retain under the Plan, on account of such junior Claim or Equity Interest, any property.

51. The Debtors have established by substantial, credible and uncontested evidence that no NewCal Common Stock or any interest therein will be issued on the Effective Date to any person other than (i) AP and AC (or their designees), pursuant to the Investment Agreement, (ii) the Distribution Agent, for the benefit of holders of Allowed General Unsecured Claims

pursuant to the Plan, and (iii) the Continental Airlines Retirement Plan, pursuant to the PBGC Settlement and the Plan. Keane Tr. 316-17. There are no understandings regarding the issuance of NewCal Common Stock in the future to any other person and specifically, to any member of the Debtors' management. The Disclosure Statement had earlier reflected that there could possibly be some NewCal Common Stock issued on the Effective Date, other than the shares specifically allocated pursuant to the Investment Agreement. All of the Investors, the Unsecured Creditors Committee and the Debtors believed that this unallocated stock would be an asset of NewCal, available to be disposed of by NewCal for legitimate corporate purposes, including to discharge or settle administrative claims or liabilities of NewCal and obtain assets or services for NewCal.

52. The Plan provides the same treatment for each Claim of a particular class unless the holder of a particular Claim agrees to a less favorable treatment of such particular Claim.

53. Each class of General Unsecured Claims (i.e., Classes 13, 14, 15 and 16) has accepted the Plan in terms of both number and amount. Classes 15 and 16 have voted to make the Cash Election applicable to such classes and Classes 13 and 14 have not voted to make such Cash Election and will therefore receive their respective Pro Rata Share of Additional NewCal Common Stock as provided by the Plan. Exhibits 31, 32, 33.

54. The Plan provides that Classes 13, 14, 15 and 16 shall receive 44.1%, 20.6%, 3.0% and 32.3%, respectively, of the Creditors' NewCal Stock and, subject to the effect of the Cash Election, all other consideration distributed to General Unsecured Creditors.

55. The settlements reflected and set forth in Article 2, Section 2.1 of the Plan (the "Article 2 Provisions") providing for the pooling of the assets and liabilities of certain of the Debtors' estates, establishing four separate Classes of General Unsecured Claims, and allocating the Creditors' NewCal Stock and other consideration among those four classes, as set

forth above, are reasonable, fair, equitable, and non-discriminatory, in light of all the evidence presented, including, without limitation, evidence with respect to (i) the enterprise values contributed by the CAL Debtors, the Commuter Debtors, and the System One Debtors, (ii) the various intercompany Claims that certain Debtors could assert against other Debtors and the defenses that could be asserted against such Claims, (iii) CAL's likelihood of success in disallowing, subordinating or offsetting the various claims that CTA could assert against CAL, (iv) the relative net values of the various Debtors' estates, the probability of success on the merits of claims that the various estates and Claims against such Debtors should be substantively consolidated, and the defenses that could have been asserted to substantive consolidation, (v) the substantial delay and expense that the various estates would incur were these issues not settled, (vi) the limited value available for distribution to General Unsecured Claims, (vii) the further harm that the Debtors' estates would suffer were the Plan not confirmed, and (viii) the strong public interest in the rehabilitation of the Debtors.

56. All the serious potential investors were interested in investing in the Debtors as a consolidated enterprise. All these investors contemplated a structure such as the one provided by the Plan in which they would invest in NewCal with all the assets of the various affiliated Debtors either owned by NewCal or by a subsidiary of NewCal. Keane Tr. 318. The investors would receive in part common stock for their investment with the remaining common stock to be allocated to General Unsecured Claims. Keane Tr. 316. Such a structure requires some method for allocating common stock among the various General Unsecured Claims.

57. The limited substantive consolidation employed to create four pools under the Plan and to allocate the Creditors' NewCal Stock and other consideration among those four pools is reasonable, fair and equitable. Keane Tr. 332, 339, 344. The assignment of each of the Debtors to a specified pool is logical in light of the nature of their respective businesses. The CAL Debtors are completely integrated and

perform the same service. Keane Tr. 312. The Commuter Debtors operate as one under the name Continental Express and report on a consolidated financial basis. Keane Tr. 313. The System One Debtors operate together. Keane Tr. 313. The CTA Debtors all provide services for and collect fees from Continental and System One. Keane Tr. 314. Condensing from 53 separate Debtors to four pools of Debtors greatly simplified the value allocation process. Keane Tr. 316-17.

58. No unsecured non-priority creditor has objected to being included in a particular pool of unsecured claims except certain holders of CTA Senior Notes and holders of Series D Preferred Stock issued by Eastern who assert claims pursuant to a Subordinated Guarantee of CTA. Those creditors object principally to the allocation of shares of Class A and B Common Stock among Classes 13, 14, 15 and 16. No creditor of Chelsea, TAC Fuel, CML Holdings or the SPC Debtors (the members of the CTA pool other than CTA) has objected to the creation of the pools or the allocation of value. As Keane testified, the holders of claims against CTA are benefitted by being substantively consolidated with the assets and claims of the other CTA Debtors. Keane Tr. 336, 338. Exhibits 10 and 13 show that the ratio of assets to unsecured claims is greater in the CTA pool than for CTA standing alone.

59. The Plan is based upon and incorporates the PBGC Settlement which has been previously approved by the Court. By its terms, the PBGC Settlement is subject to confirmation of a Chapter 11 Plan of reorganization. Subject to Section 12.17 of the Plan, the Plan also incorporates the Eastern Settlement which has previously been approved by the Court. The allocation of the Allowed General Unsecured Claims of the PBGC and Eastern, respectively, contemplated by such settlements and set forth in the Plan is fair and reasonable.

60. Among CTA's principal assets is the Intercompany Secured Note against CAL. Bryant Tr. 899. With accrued interest, CTA would have a claim against CAL on that note in the amount of $106 million as of March 31, 1993. Rowen Tr. 925.

61. The testimony of Robert Rowen establishes that CAL has numerous defenses to that note and other claims asserted by CTA, and has various affirmative claims against CTA, that these defenses and affirmative claims are substantial, and that CAL would have a reasonable probability of success on the merits. Rowen's testimony also establishes that these claims and defenses would be vigorously prosecuted by CAL's estate and its creditors in a hypothetical liquidation, and that such litigation would be costly and lengthy. First, CAL could assert that the early repayments by CAL of the $150 million unsecured note within one year of the Petition Date were preferential transfers and that the prepayment of that note followed a few months later by a new $85 million secured facility from CTA constituted an avoidable preference pursuant to section 547 of the Bankruptcy Code by permitting CTA to in effect refinance antecedent unsecured debt. Rowen Tr. 927. Avoidance of that note would enable CAL to fully offset any recovery CTA would have against CAL before CAL distributed any assets to CTA under the reorganization and would constitute a defense to any claim by CTA pursuant to section 502(d) of the Bankruptcy Code. Rowen Tr. 927. CAL would allege that these transactions were made during the one year preferential payment period for insiders and while CAL was insolvent, enabling CTA to receive more than it would have in a Chapter 7 liquidation of CAL. Rowen Tr. 928-29.

62. Second, CAL would assert that any claim by CTA should be equitably subordinated to a status less than that of a secured claim due to CTA's exercise of control over CAL which benefitted CTA. Rowen Tr. 931.

63. Third, CAL would seek to recover prior payments of management fees to CTA, TAC Fuel fees and Chelsea Catering fees within one year of the Petition Date as fraudulent conveyances. Rowen Tr. 932.

64. Furthermore, the Court finds compelling the testimony of Brian Keane that the settlements of these claims pursuant to the Article 2 Provisions are fair and reasonable from a financial point of view, and that neither AC and AP, nor any of

the other potential investors, would be likely to invest in NewCal if the assets of NewCal or the NewCal Subs continued to be subject to such claims.

65. The Settlement of such claims pursuant to the Article 2 Provisions is well within the range of reasonable litigation results and in the best interests of the estates of all of the Debtors. The benefits to all creditors and to the CTA creditors of the settlement embodied in the Article 2 Provisions greatly outweigh any harm claimed by the objecting creditors.

66. The so-called Ad Hoc Committee of CTA Bondholders (the "Ogata/Lustig Group") failed to take advantage of formal discovery procedures and to use information timely made available to them. The Ogata/Lustig Group never made a formal discovery request until approximately 4:00 p.m. on March 15, 1993, one day before the Confirmation Hearing was to begin at 9:30 a.m. Exhibit 10A. The Ogata/Lustig Group had previously benefitted from informal discovery which the Debtors would not have made available if the Ogata/Lustig Group had filed a formal discovery request earlier. Exhibit 10A.

67. Additionally, during the first two days of the Confirmation Hearing, when the Debtors introduced evidence relevant to the Ogata/Lustig Group's Objections, the Debtors made available the underlying materials Keane relied upon in his testimony and Exhibits each day after the hearing. The Ogata/Lustig Group did not inspect any documents after the first day of the hearing, March 16, 1993 but did inspect the documents made available after the second day of the hearing, March 17, 1993. These documents are contained in Exhibit 34, which include those which support Keane's March 17, 1993 testimony concerning liquidation analyses, pooling, and the allocation of Creditors' NewCal Stock and other consideration among the Pools. The Ogata/Lustig Group was offered copies of the documents included in Exhibit 34 on the night of March 17, 1993 in time for them to cross-examine Keane on March 18, 1993. The Ogata/Lustig Group chose not to take

copies of these documents and did not cross-examine Keane on March 18, 1993.

68. The Plan provides for the amendment to the charter of CAL in the form of the Restated Certificate of Incorporation (the "Restated Certificate") filed as an exhibit to the Second Modification, which Restated Certificate includes provisions prohibiting the issuance of nonvoting equity securities as required by section 1123(a)(6) of the Bankruptcy Code and provides, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any equity securities having a preference over another class of equity securities with respect to dividends, adequate provision for the election of directors representing such preferred class in the event of default in the payment of such dividends.

69. The provisions of the Restated Certificate and the NewCal By-laws prohibiting non-United States citizens from voting NewCal Common Stock held by them, unless they are listed on the stock register to be maintained by NewCal, which register is limited to 25% of the voting power of common shareholders, are fair, reasonable and are, among other things, intended to ensure that CAL will remain a certificated air carrier under section 401 of the FAA, 49 U.S.C. § 1371, in light of the Financing Transaction, which itself provides funding critical to the effectiveness and feasibility of the Plan. Such provisions do not contravene section 1123(a)(6) of the Bankruptcy Code. After completion of the Financing Transaction, NewCal will remain such a certificated air carrier.

70. It appears that the Debtors will satisfy each and every condition precedent to the effectiveness of the Plan set forth in Article 13 of the Plan.

71. After the Effective Date, NewCal and the NewCal Subs shall continue to engage in business and the Plan does not provide for the liquidation of all or substantially all of the property of the Debtors' estates.

72. The Debtors have made a careful review of their executory contracts and unexpired leases, and it is a reasonable exercise of the Debtors' business judgment for them to reject all such executory contracts and unexpired leases other than the "Assumed Agreements" referred to in the Plan, i.e., those executory contracts and unexpired leases that have either already been assumed pursuant to an order of the court or are the subject of a pending motion to assume. The assumption on the Effective Date pursuant to section 365 of the Bankruptcy Code of the unexpired aircraft leases identified in Schedule 8 to the Plan, as modified by the Modifications, is the result of the exercise of sound business judgment by the Debtors, and is in the best interest of the Debtors, their respective bankruptcy estates, and their creditors.

73. Notice of the Modifications was proper under Bankruptcy Rule 3019. The modifications to the Plan contained in the Modifications do not adversely change the treatment of the Claim of any creditor or the interest of any Equity Interest holder who has not accepted the Modifications.

Therefore, THIS COURT HEREBY CONCLUDES, as a matter of law, that:

1. This is a core proceeding within the meaning of 28 U.S.C. § 157.

2. The Court shall confirm a plan if it satisfies all the requirements of section 1129 of the Bankruptcy Code.

3. Notice and distribution of the Plan and the Disclosure Statement were appropriate and complied with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules. The opportunity for a hearing on these matters was full and adequate.

4. The Plan complies with the applicable provisions of the Bankruptcy Code as required by section 1129(a)(1) thereof, and the Debtors, as proponents of the Plan, have complied with the applicable provisions of the Bankruptcy Code as required by section 1129(a)(2) thereof.

5. The settlements embodied in the Article 2 Provisions are just, within the bounds of reasonableness, and are of substantial benefit to Creditors of all of the Debtors. Accordingly, the standards for approval of such settlements under Bankruptcy Rule 9019(a) are satisfied.

6. The Plan has been proposed in good faith and not by any means forbidden by law as required by section 1129(a)(3) of the Bankruptcy Code.

7. The Plan is feasible and provides adequate means for implementation of the Plan.

8. All Claims against CTA evidenced by or arising under the Subordinated Guarantee of Payments executed by CTA with respect to Depository Preferred Shares representing 11.36% Cumulative Junior Preferred Stock of Eastern, dated as of November 25, 1986, are expressly stated by the terms of such Subordinated Guarantee to be subordinate and junior in right of payment to certain Senior Indebtedness (as defined in such Subordinated Guarantee). Section 4.1 of the Subordinated Guarantee prohibits payment to the beneficiaries of such Guarantee (the "Subordinated Eastern Holders") before the holders of Senior Indebtedness are paid in full. Section 4.2 of the Subordinated Guarantee contains a narrow exception to the prohibition of payments to the Subordinated Eastern Holders. At most, Section 4.2 permits the distribution to Subordinated Eastern Holders of fully-subordinated reorganization securities if a plan of reorganization so provides, and prevents the holders of Senior Indebtedness from complaining that their legitimate rights have not been preserved by such distribution. However, no fully-subordinated reorganization securities are being issued under the Plan. Moreover, nothing in Section 4.2 of the Subordinated Guarantee requires any distribution to Subordinated Eastern Holders. Since the holders of Senior Indebtedness are receiving far less than a 100% recovery, the Plan properly classifies such claims as "Subordinated Claims" included in Class 17 and properly enforces the subordination provisions of the Subordinated Guarantee. *See* section 510(a) of the Bankruptcy Code.

9. The shares of NewCal Common Stock which were originally contemplated by the Disclosure Statement as possibly being issuable to entities other than the Investors, the General Unsecured Creditors, and Continental's pension plan ("Unallocated Shares") will not be issued on the Effective Date and there is no agreement or understanding relating to such issuance. The Unallocated Shares were contemplated to be an asset of NewCal which could be used, among other things, to discharge or consensually settle claims against NewCal, including settlement of claims which might otherwise be entitled to administrative priority. If any of such shares had become available for issuance or distribution, none of such shares could have been distributed to holders of Subordinated Claims or Equity Interests. The Plan specifically provides as contemplated by section 1129(b)(2)(B) of the Bankruptcy Code, that Subordinated Claims and Equity Interests could not receive or retain any property. The Official Committee of Unsecured Creditors has advised the Debtors and the Court that it would oppose any attempt to provide value to Subordinated Claims or Equity Interests. Contrary to the position advanced by the Committee of Equity Security Holders, neither the absolute priority rule nor any other provision of the Bankruptcy Code can be construed to require distribution to junior interests when senior interests have accepted less than full payment of their claims. In this case no class junior to equity interests is receiving any distribution and, accordingly, the Equity Committee cannot invoke the absolute priority rule.

10. Pursuant to section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the Modifications should be and are deemed accepted by all Creditors who have previously accepted the Plan and shall be deemed incorporated into the Plan in their entirety.

11. The Plan Debt Financing, to the extent not approved by previous order of this Court, shall be deemed to be approved in connection with confirmation of the Plan, and the Debtors, NewCal, the NewCal Subs, and Continental Micronesia shall be authorized to enter into the Plan Debt Financing, and to

take all steps necessary and appropriate to consummate the transactions contemplated thereby.

Now, upon the motion of the Debtors and after due deliberation, the Court hereby ORDERS, ADJUDGES AND DECREES THAT:

1. The Plan be, and it hereby is, confirmed.

2. The settlements of claims and defenses comprising and included in the Article 2 Provisions are hereby approved pursuant to Bankruptcy Rule 9019(a) as a just, equitable, reasonable, and non-discriminatory compromise of the controversies and Claims resolved by such settlements, and such settlements are binding on all Persons affected thereby.

3. To the extent any Objections to confirmation of the Plan have not been withdrawn prior to entry of this Order or are not cured by the relief granted herein, all remaining Objections to confirmation of the Plan be, and they hereby are, overruled and all withdrawn Objections be, and they hereby are, deemed withdrawn with prejudice.

4. NewCal is authorized to fix, and to give notice to all banks, brokers, depositories and other similar financial intermediaries and "street name" holders of the record date for distributions to creditors to be established pursuant to Bankruptcy Rule 3021.

5. The record of the Confirmation Hearing be, and it hereby is, closed.

6. The Debtors are hereby authorized to assume all executory contracts and unexpired leases that are the subject of a motion to assume pending on the date hereof, either without amendment, or with such amendments thereto as shall be agreed upon between the Debtor party thereto and the non-Debtor parties thereto, and to reject all executory contracts and unexpired leases that are not Assumed Agreements under the Plan. The unexpired aircraft leases identified in Schedule 8 to the Plan, as modified by the Modifications, shall be and

hereby are assumed pursuant to section 365 of the Bankruptcy Code, effective as of the Effective Date.

7. In accordance with the Plan, on the Effective Date, (a) CAL will be reorganized as "NewCal," which will continue the airline and related businesses conducted by CAL; (b) each of the other Debtors will merge with and into CAL on the Effective Date, with NewCal as the surviving corporation; (c) NewCal will immediately contribute the assets of the Commuter Debtors to a new wholly-owned subsidiary named Continental Express, Inc. ("NewEx"), which will assume certain related liabilities, and will continue the commuter airline business conducted by the Commuter Debtors; (d) NewCal will immediately contribute the assets of the System One Debtors to a new wholly-owned subsidiary named System One Information Management, Inc. ("NewOne"), which will assume certain related liabilities, and will continue the computer reservations and related businesses conducted by the System One Debtors; and (e) NewCal will transfer the assets used in the Continental/Air Micronesia operations to a subsidiary, initially 100% owned by NewCal, that will be an independently certificated airline called Continental Micronesia, Inc. ("Continental Micronesia"). NewCal then will contribute all of its equity interest in Continental Micronesia to Air Micronesia, Inc. ("AMI") in exchange for a 91% interest in AMI, and in conjunction therewith, Continental Micronesia and United Micronesia Development Authority, Inc. will enter into various agreements (the "UMDA Agreements") relating to the restructuring of the Continental/Air Micronesia business.

8. In accordance with Section 7.3 of the Plan, all proofs of claim with respect to Claims arising from the rejection of executory contracts or unexpired leases shall be filed with the Bankruptcy Court within thirty (30) days after the date of entry of this Order, unless a separate order of the Court approving such injection requires filing by an earlier date, or unless a stipulation entered into by the Debtors (or NewCal) and a particular claimant allows for filing a claim at a later date in order to allow the Debtors or NewCal to provide the

information necessary to calculate such claim. Any Claims arising from any such rejection not filed within such times shall be forever barred from assertion against the Debtors, their estates and property, or NewCal or any NewCal Sub.

9. In accordance with Section 12.15 of the Plan, the investment Agreement and the Series A Note Purchase Agreements, are hereby approved or their prior approval is hereby ratified, and the Debtors, NewCal, the NewCal Subs and Continental Micronesia are expressly authorized to take all necessary and appropriate steps, and perform all necessary and appropriate acts, to consummate the terms and conditions of the Plan, including, without limitation, the mergers and related transactions referred to in Section 12.2 of the Plan and the consummation of the transactions contemplated by the Investment Agreement and the Related Agreements (including the Plan Debt Financing) and the other transactions contemplated by Section 12.13 of the Plan. Without limiting the foregoing, NewCal is authorized to consummate the sale of the Series B Notes referred to in the Investment Agreement to Air Canada or one or more third parry investors on the terms and conditions described in the Investment Agreement. The Debtors and NewCal are authorized to pay all reasonable fees and expenses (including the Expenses, Hedge Expenses and Indemnity referred to in the Series A Note Commitment Agreements and any similar fees and expenses provided for in the documentation relating to the issuance and sale of the Series B Notes) which may be required by the Plan Debt Financing as such become due and as an Allowed Administrative Expense pursuant to section 507(a)(1) of the Bankruptcy Code.

10. In accordance with section 1141 of the Bankruptcy Code, the plan and its provisions shall be binding upon the Debtors and their successors (including NewCal and the NewCal Subs) and any other entity created pursuant to the Plan, any Person or entity issuing securities under the Plan, any Person or entity acquiring or receiving Property under the Plan, any lessor or lessee of property to or from the Debtors, and any holder of a Claim against or Equity Interest in the

Debtors, whether or not the Claim or Equity Interest of such Creditor or Equity Interest Holder is impaired under the Plan and whether or not such Creditor or Equity Interest Holder has filed, or is deemed to have filed, a proof of Claim or Equity Interest, or has accepted or rejected the Plan.

11. In accordance with section 1141 of the Bankruptcy Code, and except for any security interests provided under the Plan or contemplated by the Financing Transaction, any property transferred or otherwise dealt with in the Plan shall be free and clear of all Claims against and Equity Interests in the Debtors, and all such property of the Debtors' estates shall, on the Effective Date, vest in those entities as designated in and provided for by the Plan. Pending the occurrence of the Effective Date, all such property shall remain property of each respective Debtor's bankruptcy estate, and such bankruptcy estates shall continue until the occurrence of the Effective Date.

12. In accordance with Section 14.3 of the Plan and section 1141 of the Bankruptcy Code, except as otherwise specifically provided in the Plan, upon the occurrence of the Effective Date the consideration distributed under the Plan shall be in exchange for and in complete satisfaction, discharge, release, and termination of, all Claims (including, without limitation, all Eastern Claims referred to above) of any nature whatsoever against any Debtor or any of its assets or properties and all Equity Interests in any Debtor; and except as otherwise provided herein or in the Plan, upon the Effective Date (i) each Debtor shall be discharged and released pursuant to section 1141(d)(1)(A) of the Bankruptcy Code from any and all Claims, including but not limited to demands and liabilities that arose before the Effective Date, all Stockholder Actions as they relate to such Debtor, all debts of the kind specified in section 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (a) a proof of claim based upon such debt is filed or deemed filed under section 501 of the Bankruptcy Code; (b) a Claim based upon such debt is allowed under section 502 of the Bankruptcy Code; or (c) the holder of a Claim based upon such debt has accepted the Plan,

and (ii) all rights and interests of holders of Equity Interests in each Debtor shall be terminated pursuant to section 1141(d)(1)(B) of the Bankruptcy Code. This Order shall be a judicial determination, effective on the occurrence of the Effective Date, of discharge and termination of all liabilities of and all Claims against, and all Equity Interests in, each Debtor, except as otherwise specifically provided in the Plan. On the Effective Date, as to every discharged debt, Claim and Equity Interest, the Creditor or Equity interest holder that held such debt, Claim or Equity Interest is permanently enjoined and precluded from asserting against NewCal or any NewCal Sub, or against their assets or properties or any transferee thereof, any other or further Claim or Equity interest based upon any document, instrument or act, omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date, except as expressly set forth in the Plan.

13. In accordance with section 524 of the Bankruptcy Code, effective on the occurrence of the Effective Date, this Order:

> (i) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the Debtors with respect to any debt or Claim discharged hereby; and
>
> (ii) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt or Claim as a personal liability of the Debtors, NewCal, any NewCal Sub or Continental Micronesia.

14. On the Effective Date, the transfers of assets by the Debtors contemplated by the Plan will be legal, valid, binding and effective transfers of property and will, to the fullest extent permitted by the Bankruptcy Code, vest in the respective transferee good title to such property, free and clear of all liens, Claims and encumbrances, except as otherwise provided for by the Plan or as required in order to implement the Financing Transaction. The creation and perfection on the

Effective Date of the liens securing the Series A Notes and the Series B Notes will not be made with actual intent to hinder, delay, or defraud any entity, will be made for reasonably equivalent value, will not result in the insolvency of NewCal or Continental Micronesia, will not leave NewCal or Continental Micronesia with unreasonably small capital with which to conduct its businesses, will not be made with the intent or belief that NewCal or Continental Micronesia would incur debts that NewCal or Continental Micronesia, respectively, would be unable to pay as they become due, nor in any other manner constitute fraudulent conveyances or transfers. The establishment of Continental Micronesia's business in conformity with the provisions of the Series A Note Purchase Agreements will not result in significant commingling or entangling of the assets of Continental Micronesia with the assets of NewCal, will create a free-standing operating entity, and will not constitute a basis for substantive consolidation of the assets of Continental Micronesia with the assets of NewCal.

15. In accordance with section 1142 of the Bankruptcy Code, the Debtors, NewCal, each NewCal Sub, and any other entity created or Person designated pursuant to the Plan be, and they hereby are, authorized, empowered and directed to issue, execute, deliver, file and record any document, and to take any action necessary or appropriate to implement, effectuate and consummate the Plan and the Financing Transaction and any transactions contemplated thereby in accordance with their respective terms, whether or not any such document is specifically referred to in the Plan, the Investment Agreement, the Plan Debt Financing or any exhibits thereto, and without further application to or order of this Court. Pursuant to section 1142(b) of the Bankruptcy Code, but subject to the retained jurisdiction of the Court to resolve disputes as provided in the next sentence, all Persons holding Claims or Equity Interests which are dealt with under the Plan be, and they hereby are, directed to execute, deliver, file or record any document, and to take any action necessary to implement, effectuate and consummate the Plan in accordance with its terms, and all such Persons shall be bound by the terms and

provisions of all documents to be executed by them in connection with the Plan, whether or not such documents actually have been executed by such Persons. The Court retains jurisdiction to hear and determine any dispute concerning the proposed application of section 1142 of the Bankruptcy Code and of the preceding sentence. The foregoing shall not, however, in any manner adversely affect or impair any of the rights of the parties of the Investment Agreement or the Plan Debt Financing pursuant to, or release any such party from any condition under, the agreements and instruments relating thereto.

16. All steps necessary (i) for NewEx and NewOne to be duly incorporated and (ii) to effect the mergers, contributions of assets and assumptions of liability as contemplated by the Plan be, and they hereby are, authorized and approved.

17. Pursuant to Section 12.11 of the Plan, from and after the Effective Date, NewCal and the NewCal Subs may use, operate and deal with their respective assets, and may conduct and change their businesses, without any supervision by the Bankruptcy Court or the Office of the United States Trustee, and free of any restrictions imposed on the Debtors by the Bankruptcy Code or by the Court during these Chapter 11 cases.

18. All Equity Interests in each Debtor be, and they hereby are, canceled effective as of the Effective Date.

19. In accordance with Section 14.5 of the Plan, the Equity Committee shall, unless theretofore terminated, terminate on the Confirmation Date and shall thereafter have no further responsibilities in respect of these Chapter 11 cases except with respect to preparation and filing of final applications for compensation and reimbursement of expenses, which shall be filed within 90 days from the Effective Date.

20. In accordance with Section 14.4 of the Plan, the Official Committee of Unsecured Creditors shall continue in existence as the Post-Effective Date Committee for the purposes and subject to the limitations set forth in the Plan. The members of the Post-Effective Date Committee shall receive

compensation for services and reimbursement of expenses as and to the extent set forth in Section 14.4(d) of the Plan and such members and any professionals retained by the Post-Effective Date Committee shall be indemnified on the terms and to the extent set forth in Section 14.4(g) of the Plan. The reasonable and necessary expenses of professionals retained by the Post-Effective Date Committee shall be paid by New-Cal on the terms and to the extent set forth in Section 14.4(d) of the Plan.

21. Pursuant to Section 10.3(a)(ii) of the Plan, all Indentures under which Substantial Contribution Trustees (other than Banque Paribas) serve shall be deemed to have terminated, and the rights, duties and obligations of such trustees shall be discharged, on the terms and with the exceptions set forth in the Plan. Except as may have been or may be provided by order of the Court, all Indenture Trustees other than Substantial Contribution Trustees shall be required to give notice to NewCal as Distribution Agent under the Plan of their election whether or not to serve as disbursing agent pursuant to Section 10.3(a)(i) of the Plan within thirty (30) days following the Effective Date. The Indenture under which an Indenture Trustee who fails to give such notice serves shall be deemed to have terminated, as set forth in Section 10.3(a) of the Plan.

22. (a) Pursuant to the Plan, and in accordance with section 1142 of the Bankruptcy Code, the Debtors are hereby authorized to take such corporate action as may be necessary and appropriate to implement and effectuate consummation of the Plan and the Financing Transaction, each of the agreements and instruments referred to therein or contemplated thereby (including all documents, instruments, certificates and agreements to be entered into pursuant to the Plan or the Financing Transaction by the Debtors, NewCal, or any NewCal Sub and any successors to the Debtors) (the "Agreements"), and this Order. Such authorization includes, without limitation, authority to execute and deliver one or more merger agreements providing for the merger of all of the Debtors other than CAL into CAL, with NewCal as the surviving entity, in

accordance with and pursuant to the terms of the Plan (the "Merger Agreements"). Any one or more of Robert Ferguson, Charles Goolsbee, John Luth and Beth Hessler or any other President, Vice President or Secretary of any of the Debtors, as necessary, are hereby designated to execute, on behalf of one or more of the Debtors, the Agreements, the Merger Agreements, any preferred stock designations, and any other certificate, articles or other documents that such officer or officers deem necessary or advisable in order to consummate the mergers and to otherwise effectuate the Agreements, the Merger Agreements, the Financing Transaction, the UMDA Agreements and the Plan.

(b) This Order shall constitute all approvals and consents, including without limitation, approvals of the boards of directors and shareholders of each of the Debtors, if any, required by the laws of the States of Delaware, California, Texas, Colorado and Nevada (and the laws of any other state) with respect to the implementation and consummation of the Plan and the Investment Agreement and Related Agreements, including without limitation, the election of the Board of Directors of NewCal (which shall consist of the persons identified as such at the Confirmation Hearing and whose names are set forth on Schedule 5 to the Plan, filed as an Exhibit to the Second Modification), the adoption of the Restated Certificate and By-Laws of NewCal, the adoption of any certificate of designation for preferred stock to be issued pursuant to the Plan or the Financing Transaction, the election of the officers of NewCal by the Plan, the adoption of all necessary and appropriate resolutions consistent with the Plan or the Financing Transaction, the mergers contemplated by the Plan, and the execution, delivery and performance of the Agreements and the Merger Agreements and the transactions contemplated by the Agreements and the Merger Agreements. The Secretary of State of the States of Delaware, Texas, Colorado, Nevada and California (and any other state and any other governmental agency, board, bureau or office of any of the foregoing or the United States or any other state) are authorized and directed to accept for filing and to file any certificates or articles of merger, the Merger Agreements, restated certificates of

incorporation, certificates of designation for preferred stock, or other instruments necessary and to take any and all other actions necessary to give effect to the mergers and such other transactions contemplated by the Merger Agreements, the Agreements and the Plan.

23. Pursuant to the Plan and in accordance with section 1142 of the Bankruptcy Code, the Restated Certificate and the By-Laws of NewCal in the forms annexed as Exhibits to the Second Modification be and hereby are, directed to be the Restated Certificate and By-Laws of NewCal, effective as of the Effective Date, and CAL is hereby authorized to file with the Secretary of State of the State of Delaware, or with any other governmental agency, board, bureau or office within or without the State of Delaware, such Restated Certificate and as appropriate, the By-Laws, and the Debtors are hereby authorized to take any and all actions necessary to provide that such Restated Certificate and By-Laws shall be in effect as of the Effective Date. Each of the three Directors of New-Cal designated by the Creditors' Committee shall serve initial terms of three years commencing on the Effective Date.

24. On the Effective Date, NewCal shall pursuant to Section 10.2(a) of the Plan issue the Creditors' NewCal Stock and the Additional NewCal Common Stock, and shall deliver the Class Cash, to the Distribution Agent to be held in trust pursuant to the Plan, giving effect to the election by Classes 13 and 14 to receive Additional NewCal Common Stock and by Classes 15 and 16 to receive additional Class Cash in lieu of Additional NewCal Common Stock. The Distribution Agent shall distribute such Creditors' NewCal Stock, Additional NewCal Common Stock, and Class Cash to each holder of an Allowed General Unsecured Claim as provided in the Plan, and shall otherwise perform its obligations under section 10.2 of the Plan.

25. Pursuant to section 1145 of the Bankruptcy Code, the issuance of the Creditors' NewCal Stock and the Additional NewCal Common Stock to the Distribution Agent, and the distribution thereof to holders of Allowed General Unsecured

Claims as provided by the Plan, shall be exempt from the provisions of section 5 of the Securities Act of 1933, as amended (15 U.S.C. § 77(e), as amended) and any state or local law requiring registration for the offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security.

26. Pursuant to section 1146(c) of the Bankruptcy Code, but subject to any stipulation between the Debtors and any taxing authority previously approved and so ordered by the Court, neither the issuance, transfer or exchange of a security under the Plan (including to AP and AC pursuant to the Investment Agreement) nor the making nor delivery of an instrument of transfer nor the revesting, transfer and sale of any real or personal property of the Debtors in accordance with the Plan (including without limitation, the PBGC Settlement, the IRS Settlement, and the Financing Transaction including without limitation the Plan Debt Financing and the creation and perfection of any lien or security interest in connection therewith, each as contemplated by the Plan), the merger transactions and contributions of assets contemplated by Section 12.2 of the Plan, nor any of the integral transactions referred to in Section 12.13 of the Plan, shall subject the Debtors, NewCal or the NewCal Subs to any state or local sales, use, transfer, documentary, recording, or gains tax.

27. The Disputed Administrative Claims of NationsBank on account of Market Decline are Allowed in the amount, if any, referred to with respect to such Claims in paragraph 34 of the Findings of Fact included within this Order, and any and all alleged or asserted Administrative Claims of NationsBank by reason of Market Decline other than such Allowed Claim, if any, are disallowed as Administrative Claims. No Eastern Claims referred to above shall be entitled to any administrative or other priority over General Unsecured Claims or to specific performance or to any injunctive or equitable relief, or other prospective relief.

28. The Debtors and NewCal are hereby authorized to execute and deliver, and to take all necessary or appropriate actions to effectuate, the New Aircraft Agreements.

29. Allowed Claims under the Chase DIP Loan Agreement and related documents, including all Claims for principal interest, fees, expenses and other amounts constituting "Obligations" thereunder, shall be paid in full in Cash by CAL on the Confirmation Date or such later date as may be agreed upon by CAL or NewCal and the holders of such Claims pursuant to the terms of the Chase DIP Loan Agrement. As of April 12, 1993, Allowed Claims under the Chase DIP Loan Agreement and related documents include the Allowed Claim of The Chase Manhattan Bank (National Association) in the amount of $16,709,360.73; the Allowed Claim of Mellon Bank, N.A. in the amount of $11,700,064.44; the Allowed Claim of Internationale Nederlanden Bank N.V. (formerly NMB Postbank Groep N.V.) in the amount of $11,696,552.51; and the Allowed Claim of The Chase Manhattan Bank (National Association), as Agent, in the amount of $103,051.25.

30. Notwithstanding anything to the contrary provided herein or in the Plan, the obligations of CAL described in Section 11.7 of the Chase DIP Loan Agreement shall survive the occurrence of the Confirmation Date and the discharge of Claims under section 1141 of the Bankruptcy Code, the Plan and this Order.

31. The Final Bidding Procedures Order, the Investment Agreement and the Interim Procedures Approval Order shall survive the entry of this Order and shall remain in full force and effect.

32. Pursuant to the Restated Certificate, NewCal has elected not to be governed by the provisions of Section 203 the Delaware General Corporation Law.

33. On March 16, 1993, the Internal Revenue Service and the Debtors entered into a "Stipulated Withdrawal of United States Internal Revenue Service's Objection to Debtors'

Second Amended Plan of Reorganization." Such stipulation is hereby approved pursuant to Bankruptcy Rule 9019(a) as a just, equitable and nondiscriminatory compromise of the Internal Revenue Service's Objection to Second Amended Joint Plan of Reorganization, which the IRS filed on March 9, 1993.

34. The PBGC Settlement is in settlement of liability under title IV of the Employment Retirement Income Security Act of 1974, and was entered into by the PBGC and one or more other parties before, on or after the date of the enactment of the Aircraft Equipment Settlement Leases Act of 1993; the Debtors are parties to such settlement and were debtors under the Bankruptcy Code; and each lease which covers any Aircraft identified in Schedule 4(f) to the PBGC Settlement and which will be entered into between certain Owner Trusts as lessors and NewCal as lessee pursuant to the PBGC Settlement will provide that such lease agreements are to be treated as leases. Accordingly, all such lease agreements between such Owner Trusts as lessors and NewCal as lessee shall be treated as leases for purposes of section 1110 of the Bankruptcy Code.

35. Notwithstanding confirmation of the Plan, this Court retains exclusive jurisdiction over the Debtors' Chapter 11 cases pursuant to and for the Purposes of (a) sections 105(a) and 1127 of the Bankruptcy Code, (b) Section 15.1 of the Plan, and (c) for such other purposes as may be necessary or useful to aid in the confirmation and consummation of the Plan and its implementation. Except as may have been expressly provided in prior orders of the Court, notwithstanding anything in the Plan to the contrary, the Court shall retain sole and exclusive jurisdiction to determine any dispute or cause of action arising under an agreement or arrangement approved by the Court providing for a sale, transfer or assignment of assets of any of the Debtors.

36. Pursuant to Bankruptcy Rule 3020(c), the Debtors shall (i) promptly serve notice of the entry of this Order as provided in Bankruptcy Rule 2002(f) to all Creditors and other

parties in interest, to be sent by first-class mail, postage prepaid, except to such parties who may be served by hand or facsimile or overnight courier, which service is hereby authorized, and (ii) cause notice of entry of this Order to be published in *The Wall Street Journal,* national edition and such other publications as Debtors may designate. It is impracticable for the Debtors to mail notice to all Equity Interest Holders since such mailing would be of considerable expense to the Debtors and would be of very limited benefit, inasmuch as in prior mailings, a large percentage of notices mailed to Equity Interest Holders were returned as undeliverable. Accordingly, notice by publication as set forth above shall constitute good and sufficient notice pursuant to Bankruptcy Rules 2002(l) and 3020(c), to all holders of Equity Interests, of the entry of this Order. Such notice shall include notice to all parties to executory contracts and unexpired leases of the bar date for filing of rejection claims specified in Section 7.3 of the Plan and decretal paragraph 8 above.

37. To the extent that any provision designated herein as a Finding of Fact is more properly characterized as a Conclusion of Law, it is adopted as such. To the extent that any provision designated herein as a Conclusion of Law is more properly characterized as a Finding of Fact, it is adopted as such. The provisions of this Order are integrated with each other and are nonseverable and mutually dependent.

Dated: Wilmington, Delaware
April 16, 1993

/s/ Helen S. Balick

Helen S. Balick
United States Bankruptcy Judge

Appendix A-1 to Plan Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
CONTINENTAL AIRLINES, INC., *et al.*,	)	Consolidated Case Nos. 90-932 through 90-984
Debtors.	)	
CONTINENTAL AIRLINES, INC., CONTINENTAL AIRLINES HOLDINGS, INC., and SYSTEM ONE HOLDINGS, INC.,	)	
Plaintiffs,	)	Adversary Proceeding No. 91-153
v.	)	
AIR LINE PILOTS ASSOCIATION INTERNATIONAL, CHARLES H. COPELAND, RONALD COLE, MATTHEW J. GIOIA and LARRY D. SCHULTE,	)	
Defendants.	)	
ELIZABETH A. HASTINGS-MURTAUGH and DANIEL P. MURTAUGH,	)	
Intervenors.	)	

ORDER

On December 18, 1992, Continental Airlines, Inc. ("Continental") and Continental Airlines Holdings, Inc., formerly known as Texas Air Corporation ("CTA" or "Texas Air") (collectively "Debtors") filed a motion for partial summary judgment under Fed. R. Civ. P. 56 and Bankruptcy Rule 7056, notice of which was timely given to defendants. By

their Motion, Debtors seek to determine whether certain labor protective provision ("LPP") claims filed by the Air Line Pilots Association, International ("ALPA") and the four named individual defendants (collectively, with ALPA, the "Defendants"), if eventually determined to be valid, are general unsecured pre-petition "claims" within the meaning of 11 U.S.C. § 101(5).

On February 4, 1993, this Court held oral argument on Debtors' action and after considering the arguments of counsel, pleadings, affidavits and exhibits on file, it is hereby

FOUND AND CONCLUDED that the Defendants have filed proofs of claim in this case that include, *inter alia,* claims allegedly based on LPPs contained in a February 23, 1986 collective bargaining agreement ("CBA") between ALPA and Eastern Air Lines, Inc. ("Eastern"), which claims ALPA has attempted to assert against Debtors in an arbitration proceeding (the "LPP Claims");

FOUND AND CONCLUDED that the LPP Claims seek, *inter alia,* back pay, front pay and specific performance of the LPPs by Debtors, and that if specific performance were granted, it could lead to the integration of the former Eastern pilots into the Continental pilot seniority list;

FOUND AND CONCLUDED that, if the LPP Claims were ultimately found to be valid, an award of monetary damages to the Defendants would be available as a matter of law in lieu of prospective relief, including specific performance;

FOUND AND CONCLUDED that the issue of whether any award granted to Defendants as a result of their LPP Claims would constitute a general unsecured pre-petition claim against Debtors is a core matter under the Bankruptcy Code. Bankruptcy Code Section 101(5)(A) defines a "claim" to include a right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. Section 101(5)(B) further defines a claim to include a right to an equitable remedy for breach of

performance if such breach gives rise to a right for payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed undisputed secured or unsecured. Because, as found and concluded above, if the LPP Claims are ultimately determined to have merit, any award ultimately rendered in Defendants' favor can be satisfied by money damages in the form of back and/or front pay, any such award would result in a claim within the meaning of Section 101(5)(A) and (B). As a core proceeding under the Bankruptcy Code, the determination of whether Defendants' LPP Claims constitute "claims" within the meaning of Section 101(5) falls within this Court's jurisdiction;

FOUND AND CONCLUDED that the LPP Claims constitute "claims" within the meaning of Section 101(5) of the Bankruptcy Code;

FOUND AND CONCLUDED that the status of Defendants' LPP Claims as general unsecured prepetition claims is determined by whether Defendants possessed a right to payment and when that right to payment arose. *In re Remington Rand Corp.*, 836 F.2d 825, 830 (3d Cir. 1988); *see In re Roth American, Inc.* 975 F.2d 949, 957 (3d Cir. 1992); *In re Chateaugay Corp.*, 87 Bankr. 779, 796 (S.D.N.Y. 1988), *aff'd sub nom. Pension Benefit Guaranty Co. v. LTV,* 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds,* 496 U.S. 633 (1990). The record reveals that the events upon which the Defendants base the LPP Claims, including the formation of the CBA, the acquisition of Eastern by Texas Air, Texas Air's stipulation approved by the Department of Transportation in 1989, and the other events or transactions that Defendants allege have given rise to obligations or liability on the part of the Debtors under the LPPs, all occurred prior to December 3, 1990, the date that Debtors filed their petitions for reorganization in this case. Thus, the LPP Claims assert a right to payment which, if it arose at all, arose prepetition;

FOUND AND CONCLUDED that, to the extent Defendants claim that at least a portion of their LPP Claims are

entitled to administration priority or prospective relief, including specific performance, based on various theories, including Defendants' assertion that the LPPs were triggered by certain post-petition transactions, their "creeping merger" theory, and their claim that Debtors' failure to comply with the LPPs conferred a benefit to Debtors' estates, Defendants have not, as required by Fed. R. Civ. P. 56(e), set forth specific facts by affidavits or as otherwise provided by the Rule showing that there is a genuine issue for trial;

FOUND AND CONCLUDED that there is no genuine issue as to any material fact and that Debtors are entitled to judgment as a matter of law;

FOUND AND CONCLUDED that Debtors are entitled to partial summary judgment as a matter of law, that the LPP Claims are, at best, general unsecured prepetition claims and are dischargeable, and as such are not entitled to administrative priority or prospective relief, including specific performance,

ACCORDINGLY, IT IS HEREBY ORDERED that Debtors' Motion for Partial Summary Judgment is granted in its entirety as to the LPP Claims filed by Defendants, and that the LPP Claims, if valid at all, are general unsecured prepetition claims and are dischargeable, and are not entitled to any administrative priority or prospective relief, including specific performance; and

IT IS FURTHER ORDERED that the relief granted here does not prejudice any other objections that Debtors have filed or will file to any and all of the Defendants' claims, including their other objections to LPP Claims.

DATED: Wilmington, Delaware
February 11, 1993

/s/ Helen S. Balick

Helen S. Balick
United States Bankruptcy Judge

Appendix A-2 to Plan Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
CONTINENTAL AIRLINES, INC., *et al.*,	)	Consolidated Case Nos.
	)	90-932 through
Debtors.	)	90-984

ORDER

Upon the Partial Objection To Allowance of Claims Based On Certain Alleged Labor Protective Provisions Involving The Air Line Pilots Association, International ("ALPA") And Eastern Air Lines, Inc. ("Eastern") (the "Partial Objection"), filed by debtors Continental Airlines, Inc. and Continental Airlines Holdings, Inc. (collectively, "Debtors") on December 22, 1992, notice of which was timely given to the affected claimants, and after considering the Partial Objection, the oppositions, and oral argument by Debtors and other affected parties, it is hereby

FOUND AND CONCLUDED that approximately 2770 persons filed proofs of claim that include, *inter alia,* claims allegedly based on labor protective provisions ("LPPs") contained in a February 23, 1986 collective bargaining agreement ("CBA") between ALPA and Eastern, which claims ALPA has attempted to assert against Debtors in an arbitration proceeding (the "LPP Claims");

FOUND AND CONCLUDED that the Partial Objection notified the persons who filed proofs of claim based on the LPP Claims (the "LPP Claimants") that Debtors objected to that portion of the LPP Claims that sought administrative expense status or prospective relief, including specific performance because:

1. The collective bargaining agreement out of which the claims arose was executed and expired prepetition;

2. The events that are alleged to have given rise to obligations on Debtors' part under the LPPS all occurred prepetition;

3. Even if such obligations arose, they can be satisfied through an alternative right to payment cognizable as a general unsecured claim; and

4. The LPP Claims are not based an any post-petition services performed for Debtors;

FOUND AND CONCLUDED that the Partial Objection notified the LPP Claimants that Debtors had on December 18, 1992 filed a motion in Adversary Proceeding No. 91-153 in this Court seeking partial summary judgment as to ALPA, which had asserted the LPP Claims on behalf of Eastern pilots; that the motion was to be heard on February 4, 1993; that, if granted, the LPP Claims would be determined to be, at best, dischargeable general unsecured prepetition claims under 11 U.S.C. § 101(5); and that Debtors' December 18, 1992 Motion for Partial Summary Judgment in Adversary Proceeding No. 91-153 was incorporated by reference in the Partial Objection;

FOUND AND CONCLUDED that the Partial Objection further notified the LPP Claimants that Debtors believed that because ALPA is the collective bargaining representative for the Eastern pilots and because the LPP Claimants are relying on an arbitration proceeding initiated by ALPA on their behalf to establish their rights under the LPPs, a ruling declaring ALPA's LPP Claims to be general unsecured prepetition claims would be binding as to the LPP Claimants, and that, if any person did not concede that the ruling as to ALPA would be binding, that person should file a written response;

FOUND AND CONCLUDED that the Notice of Partial Objection notified the LPP Claimants that responses to the Partial Objection had to be filed in writing by January 25, 1993, and that a hearing on the Partial Objection was to be held on February 4, 1993;

FOUND AND CONCLUDED that 41 written responses to the Partial Objection were filed by LPP Claimants, including one response by counsel for over 600 LPP Claimants (the "600"), which counsel also appeared and was heard at the February 4, 1993 hearing on this Partial Objection;

FOUND AND CONCLUDED that the LPP Claims seek, *inter alia*, back pay, front pay and specific performance of the LPPs by Debtors, and that if specific performance were granted, it could lead to the integration of the former Eastern pilots into the Continental pilot seniority list;

FOUND AND CONCLUDED that, if the LPP Claims were ultimately found to be valid, an award of monetary damages to the LPP Claimants would be available as a matter of law in lieu of prospective relief, including specific performance;

FOUND AND CONCLUDED that the LPP Claims are "claims" within the meaning of Section 101(5) of the Bankruptcy Code;

FOUND AND CONCLUDED that the status of the LPP Claims as general unsecured prepetition claims is determined by whether the Claimants' possessed a right to payment and when that right to payment arose. *In re Remington Rand Corp.*, 836 F.2d 825, 830 (3d Cir. 1988); *see In re Roth American, Inc.* 975 F.2d 949, 957 (3d Cir. 1992); *In re Chateaugay Corp.*, 87 Bankr. 779, 796 (S.D.N.Y 1988), *aff'd sub nom. Pension Benefit Guaranty Co. v. LTV*, 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990). The record reveals that the events upon which the Claimants base the LPP Claims, including the formation of the CBA, the acquisition of Eastern by Texas Air, Texas Air's stipulation approved by the Department of Transportation in 1989, and the other events or transactions that the Claimants allege have given rise to obligations or liability on the part of the Debtors under the LPPs, all occurred prior to December 3, 1990, the date that Debtors filed their petitions for reorganization in this case. Thus, the LPP Claims assert a right to payment which, if it arose at all, arose prepetition;

FOUND AND CONCLUDED that the Court has granted Debtors' December 18, 1992 Motion for Partial Summary Judgment in Adversary Proceeding No. 91-153 as to ALPA's LPP Claims, and, having considered the responses of the LPP Claimants and the arguments of counsel for the 600, the Court finds that its ruling as to ALPA's LPP Claims is binding on both the 600 LPP Claimants represented by counsel and the other LPP Claimants;

FOUND AND CONCLUDED further that, having considered the responses of the LPP Claimants and the arguments of counsel for the 600 and having found that the contentions of the LPP Claimants in opposition to Debtors' Partial Objection are not supported by the record, the LPP Claims are, at best, general unsecured prepetition claims and are dischargeable, and as such are not entitled to administrative priority or prospective relief, including specific performance,

ACCORDINGLY, IT IS HEREBY ORDERED that the Partial Objection is granted, and that the LPP Claims, if valid at all, are hereby determined to be, at best, dischargeable general unsecured prepetition claims that are not entitled to any administrative priority or prospective relief, including specific performance; and

IT IS FURTHER ORDERED that the relief granted here does not prejudice any other objections that Debtors have filed or will file as to any and all of the LPP Claimants' claims, including Debtors' other objections to the LPP Claims.

Wilmington, Delaware
February 11, 1993

/s/ Helen S. Balick

Helen S. Balick
United States Bankruptcy Judge

Appendix B to Plan Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re	)	
	)	Case Nos. 90-932
CONTINENTAL AIRLINES, INC., *et al.*,	)	through 90-984
	)	
	)	
Debtors.	)	

ORDER

Upon the Second Partial Objection to Allowance of Administrative Claims Based on Certain Alleged Labor Protective Provisions ("LPP Claims") Involving the Air Line Pilots Association, International and Eastern Air Lines, Inc. (the "Second Partial Objection"), filed by debtors Continental Airlines, Inc. and Continental Airlines Holdings, Inc. ("Debtors"), on January 29, 1993, notice of which was timely given to the affected claimants, and after considering the Second Partial Objection, the opposition thereto, and the statements of the parties at hearing on March 25, 1993, it is hereby

FOUND AND CONCLUDED that (1) approximately 635 claimants filed administrative LPP Claims in December 1992, (2) approximately 230 of these administrative claimants had not previously filed an LPP Claim, and therefore had not been served with Debtors' First Partial Objection, filed on December 22, 1992, (3) other than being filed as administrative claims, the LPP Claims filed in December 1992 are no different than the LPP Claims addressed and resolved by this Court's Orders dated February 11, 1993 (the "February 11 Orders"), and (4) the findings and conclusions contained in the February 11 Orders should be applied in all respects to the LPP Claims subject to the Second Partial Objection.

ACCORDINGLY, IT IS HEREBY ORDERED that Debtors' Second Partial Objection is GRANTED.

Dated: Wilmington, Delaware
April 16, 1993

/s/ Helen S. Balick

Helen S. Balick
United States Bankruptcy Judge

Appendix C to Plan Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In the Matter of	:	
CONTINENTAL AIRLINES, INC., *et al.*,	:	Case Nos. 90-932 through 90-984
	:	Motion No. 92-258
Debtors.	:	

MEMORANDUM OPINION AND ORDER

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April 16, 1993

Balick, J.

This is the Court's decision on the Motions of NationsBank of Tennessee (NationsBank or Collateral Trustee), as successor Collateral Trustee under a certain Secured Equipment Indenture and Lease Agreement, dated March 15, 1987 (the Indenture), and the National State Bank of Elizabeth, New Jersey, Harris Trust and Savings Bank and Boatmen's First National Bank of Oklahoma, N.A., as successor First, Second and Third Priority Secured Equipment Certificates Trustees under the Indenture (collectively with NationsBank, the Trustees or Movants) for Relief from the Automatic Stay and for Adequate Protection for alleged decrease in the market value of the NationsBank collateral.

NATURE AND STAGE OF PROCEEDINGS

The Movants act as trustees under the Indenture pursuant to which Continental Airlines, Inc. obtained $350 million in operating capital by causing to be issued and sold to the public three series of certificates, consisting of First, Second and Third Priority Secured Equipment Certificates. As security for repayment of the Certificates, Continental sold to the Collateral Trustee all of its right, title and interest in and to various aircraft and additional engines (the collateral).

On December 3, 1990 (Petition Date) Continental and its affiliates (Continental or Debtors) filed for relief from its creditors under Chapter 11 of the Bankruptcy Code and currently operate as debtors-in-possession under sections 1107 and 1108 of the Code. As of the petition date, the Trustees

were secured by 29 aircraft (with engines) and 77 additional jet engines.[1]

On February 21, 1991, the predecessor Collateral Trustee, First Fidelity Bank of New Jersey, N.A. (First Fidelity) joined in filing an Omnibus Motion for Order Compelling Payment of Administrative Rent, Granting Adequate Protection and Fixing Time for Assumption or Rejection of Unexpired Leases (Omnibus Motion). First Fidelity subsequently withdrew from the Omnibus Motion and, on June 28, 1991, filed its Joint Motion of Collateral Trustee and First, Second, and Third priority Secured Equipment Certificates Trustees under the $350 Million Secured Equipment Indenture for Adequate Protection. That motion was tried on September 3-6, 1991, along with adequate protection motions filed by Wilmington Trust Company and The Bank of New York (First Adequate Protection Hearing). The Court bifurcated the issues relating to the collateral's value and heard evidence regarding market value decline, deferring to a later date the issues of use and maintenance decline. On August 27, 1992, this Court issued a Memorandum Opinion and Order (August 27 Decision) in which it found that the Trustees were not entitled to adequate protection due to market value decline of the collateral.

On August 14, 1992 the Trustees filed a Motion for Relief from the Automatic Stay pursuant to § 362(d)(1) of the Bankruptcy Code for failure of adequate protection and pursuant to § 362(d)(2) of the Bankruptcy Code because the Debtor lacks equity in the collateral, and the collateral is not necessary for an effective reorganization. Subsequent to the Court's August 27 ruling, the Trustees moved by motion, dated September 14, 1992, for adequate protection for market value decline from July 1991 forward and for use and maintenance decline

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[1] Pursuant to Court orders, dated June 25, 1992 and October 6, 1992, Continental abandoned to the Trustees four airframes and eleven engines. The Trustees seek adequate protection for the decline in value of this equipment through the date of its abandonment.

from the petition date forward (Renewed Adequate Protection Motion).

Wilmington Trust Company and Bank of New York also filed motions renewing their requests for adequate protection, and the Court decided to hear the Renewed Adequate Protection Motions of all three parties simultaneously and to again limit the evidence to market value decline. Prior to the conclusion of the nine-day hearing which began on November 3, 1992 and concluded on February 5, 1993, Wilmington Trust Company and Bank of New York reached negotiated settlements with Continental and withdrew from the proceedings.

Several facts were stipulated to by Movants and Continental and are relevant to the motions at issue. First, the parties agreed that the NationsBank collateral is subject to a properly perfected security interest enforceable against Continental's estate. Second, the parties agreed that Continental has no equity in the collateral as contemplated by § 362(d)(2)(A) of the Bankruptcy Code. Finally, the parties stipulated to the authenticity and genuineness of the Avitas Blue Books, published from 1990 through 1992, as established by the testimony elicited at the deposition of Donald C. Benfell of Avitas authenticating these documents.

During the hearing, evidence was presented regarding the alleged decline in the market value of the NationsBank collateral and the necessity of that collateral to an effective reorganization of Continental. Following the hearing, the parties submitted post-trial briefs addressing the issues before the Court.

CONTENTIONS OF THE PARTIES

Movants assert that the doctrine of law of the case precludes this Court from deciding certain issues previously addressed in the Court's August 27, 1992 Decision. Thus, according to the Trustees, the Court is bound by its statement that "§ 363(e) implies that adequate protection may be sought [independent of a motion for relief from stay]". Movants also argue the Court's reliance on the January and July 1991

Avitas Blue Books and factual finding that the market value of the aircraft contained in NationsBank's collateral, as of approximately May 1991, was as stated in the July 1991 Blue Book[2], requires the Court to be bound by that finding in its determination of the present motions.

Second, the Trustees maintain that they are entitled to adequate protection because subsequent Avitas Blue Books indicate that the market value of NationsBank's collateral has seriously declined since May, 1991. It is Movants' position that the decline in the value of the collateral aircraft has actually been steeper than is shown in the Blue Books.

Movants also argue that the stay should be lifted because Debtors have no equity in the collateral, and the collateral is not necessary for an effective reorganization of Continental.

It is Continental's position that the Trustees are not entitled to any adequate protection for market value decline before August 14, 1992, the date the Trustees filed their Motion for Relief from the Automatic Stay, and only then if the collateral declined below petition date value. Continental contends any inference to the contrary in the Court's August 27 Decision is merely *dicta,* and therefore, the issue may be revisited by the Court.

Alternatively, Debtors argue that even if the market value issue was properly raised by Movants' first adequate protection motion, Movants are still only entitled to adequate protection if the collateral declined in market value to an amount less than its value on the petition date. According to Debtors, in either case, it is only relevant whether the collateral is worth more or less now than it was on December 3, 1990.

Additionally, Continental contends that the Court's reliance on the Avitas Blue Books in its August 27 Decision does not

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[2] In its August 27, 1992 Decision, the Court recognized that the values listed in the Avitas Blue Books lag the market by two or three months. Thus, the July 1991 Blue Book reflects May 1991 values.

require the Court to rely on the Blue Books for purposes of the present motions.

Finally, Debtors argue that the collateral is necessary to its reorganization efforts because any precipitous removal of the collateral, affecting approximately one-third of its fleet, would have disastrous financial consequences to its reorganization efforts.

DISCUSSION

Preliminary to any discussion of the merits of the Trustees' motions, is a determination of whether the doctrine of the law of the case affects the Court's determination of any of the issues raised by the present motions. Under the law of the case doctrine, when a rule of law is determined at one stage of a legal proceeding, that rule should govern subsequent stages of the same proceeding. *Al Haddad Bros. Enterprises, Inc. v. M/S Agapi,* 635 F. Supp. 205, 208 (D. Del. 1986), *aff'd,* 813 F.2d 396 (3d Cir. 1987) (citing *Hayman Cash Register Co. v. Sarokin,* 669 F.2d 162, 165 (3d Cir. 1982). The doctrine is, however, "a rule that is subject to the discretion of the court applying it." *Coca-Cola Bottling Co. v. The Coca-Cola Co. (Diet Coke VIII)*, 1993 WL 40311, *12 (3d Cir. (Del.)). A court's "decision to invoke the law of the case doctrine is discretionary *only* if the doctrine actually applies to the issue before the court." *Id (emphasis added).*

The first question to be addressed, therefore, is whether the Court determined in its August 27, 1992 Decision any issue presently before the Court regarding the necessity of filing a Motion for Relief from Stay in order to be entitled to adequate protection pursuant to § 362(d). In its August 27 Decision, the Court made the following statement:

> [T]he Court does not agree that adequate protection may only be sought in conjunction with a lift stay motion. While typically they are brought as alternatives, there is no such explicit requirement in the Code. In fact, the existence of section *363(e)* would

> imply that adequate protection may be sought independently (emphasis added).

Matter of Continental Airlines, Inc., 146 B.R. 536, 540 (Bankr. D. Del. 1992).

Section 363(e) provides:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, . . . the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Relying an the foregoing provision of § 363(e), this Court concluded that adequate protection may be sought under § 363(e) without filing a lift-stay motion.

The Court's August 27 Decision held that adequate protection may only be awarded from the date movants seek relief. In reaching its determination, the Court relied on the opinion of Chief Judge Lifland that a secured creditor can only receive adequate protection to the extent the collateral declined in value after the secured creditor filed its motion for adequate protection, rather than receiving compensation for all post-petition decline in value. *In re Best Products, Inc.*, 138 B.R. 155, 157 (Bankr. S.D.N.Y. 1992). This Court did not, however, address the specific question of whether a party must file a lift-stay motion in order to receive relief pursuant to § 362(d)(1). Thus, in the instant case, the question remains whether it was necessary for Movants to request relief from the automatic stay in order to be entitled to adequate protection for market value decline caused by the automatic stay.

Section 361 of the Code defines adequate protection:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by-

> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that *the stay under section 362 of this title, use, sale, or lease under section 363 of this title,* or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

In simple terms, § 361(l) provides that adequate protection is available in three contexts: 1) under § 362(d) when the imposition of the automatic stay results in a decrease in the value of an entity's interest in property; 2) under § 363(e) for a decrease in value due to the use, sale, or lease of an entity's interest in property; and 3) under § 364 when a lien is proposed to be granted on the interest of a holder of a previous lien on property.

For purposes of both the first and second adequate protection hearings, the parties agreed to bifurcate the issue of adequate protection for decline in the value of NationsBank's collateral due to use and maintenance factors from the question of adequate protection for market value decline under § 362.

Turning to § 362, the relevant provision states:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

Read together, sections 36l(l) and 362(d)(1) provide that a party in interest shall be granted adequate protection *when the continuation of the automatic stay causes* that party to suffer a decrease in the value of its property interest. In other words, a party can be granted relief from the stay if his interest is not

adequately protected; if that request for relief from the stay is not granted, and the value of the collateral is declining, adequate protection may be required. *United Savings v. Timbers of Inwood Forest,* 484 U.S. 365 (1988). Thus, the Code provides for adequate protection as alternative relief to the lifting of the stay pursuant to § 362(d). Accordingly, this Court finds that it is necessary to seek relief from the stay in order for the Court to grant relief either by lifting the stay *or* requiring adequate protection for the decline in the market value of the collateral subsequent to the imposition of the stay. *In re Best Products Co., Inc.,* 138 B.R. at 155. (adequate protection is available to cover a decline in property's value from the time adequate protection is sought).

Based on the forgoing, the Court finds that since Movants did not file a Motion for Relief from Stay until August 14, 1992, Movants are only entitled to adequate protection for any decline in the market value of their collateral from August 14, 1992 forward.

During the nine-day trial, the Court heard credible expert testimony relating to the valuation of the collateral by John E. Luth, Chief Financial Officer of Continental, Donald C. Benfell, Editor of Avitas Blue Books, and Clive G. Medland of Simat, Helliesen & Eichner (SH&E). Although Mr. Luth, Mr. Benfell and Mr. Medland provided conflicting testimony as to the value of the collateral at various times during the pendency of Debtors' bankruptcy, their appraisals are similar with regard to value of the collateral in August, 1992. Moreover, the three experts are in agreement that there has been no substantial decline in the value of the collateral since August, 1992. Based on this evidence, the Court finds that Movants are not entitled to adequate protection for any decrease in the market value of their collateral. Conversely, since movants do not suffer from lack of adequate protection under § 362(d), the Court will not grant their request for relief from the automatic stay pursuant to § 362(d)(1).

The remaining question to be addressed is whether Movants are entitled to relief from stay pursuant to § 362(d)(2)

because Debtors have no equity in the collateral, and the collateral is not necessary for an effective reorganization. Based on the agreement between the parties that Debtors lack equity in the collateral, this Court need only determine whether the collateral is necessary for an effective reorganization of Continental. Debtors bear the burden of proof on this issue. *Timbers,* 484 U.S. at 376.

The Trustees submit the expert opinion of David E. Treitel of SH&E regarding the necessity of the collateral to Continental's reorganization efforts. Mr. Treitel opines that the collateral is not necessary to a reorganized Continental for several reasons. First, there is an abundance of used aircraft and additional engines available for purchase or lease. Second, Mr. Treitel contends that the lack of profits in the airline industry reflects an excess seating capacity. Consequently, a return to profitability dictates a reduction in fleet requirements. Finally, Mr. Treitel maintains that federal legislation will require airlines to reduce the number of their aircraft of the collateral type (Stage II) by the end of 1994, and therefore, it would be practical for Continental to abandon the collateral in order to reduce the number of such aircraft in its fleet.

For its part, Continental contends it does not have the financial resources to presently abandon the collateral to the Trustees even if Continental were permitted to do so over a period of six months. According to Continental, substantial portions of the NationsBank collateral are integrated into its fleet, and any disruption to Continental's maintenance and operations programs would significantly impair its reorganization efforts. Debtors maintain that a precipitous reduction in its fleet and seat capacity would negatively impact public confidence and cripple its efforts to increase passenger revenues. Most significantly, Continental maintains that the orderly abandonment of the collateral over a period of time, in conformity with its Reorganization Plan, is necessary to meet the financial requirements of the Air Partners / Air Canada Investment Agreement. According to the Debtors, the cash available to it at the time its reorganization is consummated will enable Continental to provide for an

orderly abandonment and, if necessary, replacement of the collateral.

Although Mr. Treitel's testimony is credible as far as it goes, the Court finds that it does not adequately address the financial constraints of the Debtors. It is the Court's opinion, based on the evidence presented by the parties, that the Debtors have met their burden of showing that the collateral is necessary for an effective reorganization because any disruption in Debtors' planned schedule of abandonment and replacement of the collateral would have a negative impact on the feasibility of the Continental Reorganization Plan. For this reason, the automatic stay will not be lifted.

CONCLUSION

Based on the foregoing determinations that 1) the Movants were not entitled to adequate protection for market value decline until they filed their lift-stay motion; 2) that the Movants are not entitled to adequate protection from August 14, 1992, to the present and 3) that the collateral is necessary for an effective reorganization of Continental, the Court finds it unnecessary to address the other contentions of the parties regarding the application of the law of the case doctrine and the value of the collateral.

By court-approved stipulation, the parties agreed that the Memorandum, Decision and Order of August 27, 1992 was to be given interim treatment. Having determined that adequate protection for market value decline cannot be provided absent a request for relief from stay, it was unnecessary for this Court to reach the valuation issue in its August 27, 1992 Decision.

An order in accordance with this Memorandum Opinion is attached.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In the Matter of	:	
CONTINENTAL AIRLINES, INC., *et al.*,	:	Case Nos. 90-932 through 90-984
Debtors.	:	Motion No. 92-258

ORDER

AND NOW, April 16, 1993, for the reasons stated in the attached Memorandum opinion,

IT IS ORDERED THAT:

1. The Trustees' Motion for Relief from Stay is DENIED.

2. The Trustees' Motion for Adequate Protection is DENIED.

/s/ Helen S. Balick

JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In the Matter of	:	
CONTINENTAL AIRLINES, INC., et al.,	:	Case Nos. 90-932 through 90-984
Debtors.	:	

MEMORANDUM OPINION AND ORDER

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August 27, 1992

Balick, J.

Wilmington Trust Company (WTC), The Bank of New York (BNY) and First Fidelity Bank (FFB) (collectively Movants) have filed motions for adequate protection of their interest in aircraft collateral and related equipment and engines held by debtor-in-possession Continental Airlines, Inc. Movants all assert that they were fully secured as of the petition date but that the collateral has dropped precipitously in value post-petition, entitling them to adequate protection payments. The Debtor and the Official Committee of Unsecured Creditors oppose the motions primarily on the grounds that all depreciation occurred pre-petition and values have remained constant post-filing. For the reasons that follow, the court holds that Movants are not entitled to adequate protection.

I. FACTS

A. The Bank of New York

The Bank of New York is Trustee under a Secured Equipment Indenture and Lease Agreement, dated April 15, 1984, between BNY and People Express Airlines, Inc. (Continental is successor in interest to People Express). Under the Agreement, BNY took a security interest in twelve Boeing 727-200 advanced series airframes and twelve Pratt & Whitney JT8D-9A engines. Secured Equipment Certificates were issued in the principal amount of $66,400,000 to the public. As of the petition date, $67,529,034.67 remained outstanding under the Indenture and Lease Agreement.

B. Wilmington Trust Company

Wilmington Trust Company is Trustee under a Secured Equipment Indenture and Lease Agreement, dated April 15, 1986, entered into with People Express Airlines, Inc. Under the Agreement, the Trustee was to purchase seven Boeing 727-200 and fourteen Boeing 737-100 airframes and accompanying engines from People Express and issue Secured Equipment Certificates in the amount of $115,000,000. As of the petition date the total amount due in principal and interest was approximately $115,000,000.

C. First Fidelity Bank

First Fidelity Bank is the Collateral Trustee under a Secured Equipment Indenture and Lease Agreement, dated March 15, 1987, entered into with Continental. Under the agreement, First (10%), Second (11%) and Third (11 3/8%) Priority Secured Equipment Certificates were issued to the public in the amount of $350,000,000. (There is a Series Trustee for each series joined in FFB's motion; each of whom must authorize the Collateral Trustee's actions.) Continental granted FFB a security interest in 29 aircraft and 73 spare engines and was to make bi-annual principal and interest payments. As of the petition date, the outstanding debt was $180,047,000.

D. Bankruptcy

Continental filed bankruptcy in this court under Chapter 11 on December 3, 1990. None of the post-petition obligations under the three Indentures and Leases have been met. On February 21, 1991 Wilmington Trust, First Fidelity and The Bank of New York, among many others, filed the Omnibus Motion for Order Compelling Payment of Administrative Rent, Granting Adequate Protection and Fixing Time for Assumption or Rejection of Unexpired Leases. First Fidelity subsequently withdrew as an Omnibus Movant, filing instead the Joint Motion of Collateral Trustee and First, Second and Third Priority Secured Equipment Trust Certificates Trustees Under $350 Million Secured Equipment Indenture for

Adequate Protection on June 28, 1991. The motions were joined for trial.

Prior to trial, The Bank of New York stipulated to the fact that the Equipment Trust transaction was a secured financing arrangement rather than a lease. As a result, BNY amended its original prayer for relief to seek adequate protection only, dropping the request for administrative rent.

First Fidelity stipulated to the fact that its Indenture is a financing arrangement for the purpose of its adequate protection motion alone while reserving its right to try the "true lease" issue at a later date. Finally, Wilmington Trust refused to stipulate to the fact that its Indenture was a financing arrangement but the court ruled at the hearing that it would be treated as such for purposes of the adequate protection motion.

The valuation hearing bifurcated market value decline into two factors: decline due to market conditions and decline due to Continental's post-petition use and lack of maintenance of the collateral. The court heard only the former issue. The Bank of New York and Continental have since entered into a stipulation regarding post-petition use and maintenance. This issue remains to be resolved only as to First Fidelity and Wilmington Trust.

II. LAW

Movants assert that they are entitled to adequate protection payments as a result of the collateral's post-petition decline in market value. 11 U.S.C. §§ 361(1) & 363(e). The Debtor responds that Movants are not entitled to adequate protection payments because factually all the decline in value occurred pre-petition. In the alternative, if there has been a decline in value post-petition Movants are only entitled to compensation for the decline subsequent to the Omnibus Motion date. Finally, Continental claims these Movants should receive nothing because they have not sought relief from stay as an alternative to the requested adequate protection payments. *In re Glinz,* 69 B.R. 916, 920 (Bankr. D.N.D. 1987). Movants

respond that this last argument is first plain wrong and second that their motion seeking section 1110 protection, filed simultaneously with the adequate protection motion, is the equivalent of a lift stay motion.

Continental "may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1). One of the limitations on this right is contained in section 363(e):

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased . . . the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

The Debtor has the burden of proof on adequate protection. 11 U.S.C. § 363(o)(1).

Section 361 defines adequate protection as it is used in the code:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by--(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of the title . . . results in a decrease in the value of such entity's interest in such property[.]

The Supreme Court has drawn a distinction between oversecured and undersecured creditors seeking adequate protection. In *United States Savings Ass'n v. Timbers of Inwood Forest Assoc., Ltd.*, the Supreme Court affirmed the Fifth Circuit's denial of post-petition interest to an undersecured creditor during the pendency of the stay. 484 U.S. 365, 382 (1988). In so doing the Supreme Court held that undersecured creditors are not entitled to compensation for the delay in foreclosure attributable to the automatic stay. In dicta, the court opined that an undersecured creditor whose collateral

was decreasing in value would be entitled to adequate protection payments. *Id.* at 370.

Post-*Timbers* courts have uniformly required a movant seeking adequate protection to show a decline in value of its collateral. *See, e.g., In re Forest Ridge II, Ltd.*, 116 B.R. 937, 950 (Bankr. W.D.N.C. 1990) (undersecured creditor not entitled to adequate protection where real property collateral not declining in value). If the creditor is oversecured many courts hold that the equity cushion alone satisfies the adequate protection requirement of section 362(d)(1). *See, e.g., In re Senior Care Properties,* 137 B.R. 527, 529 (Bankr. N.D. Fla. 1992); *In re Lane,* 108 B.R. 6, 8 (Bankr. D. Mass. 1989).

A question left open in *Timbers,* and on which bankruptcy courts are split, is from what point in time are secured creditors owed adequate protection. (This issue is often presented as what is the appropriate valuation date for the collateral subject to the adequate protection motion: the petition date, motion date, confirmation or some other date.)

Movants claim they are entitled to adequate protection payments to compensate for any decline in value of the collateral post-petition. *In re Monroe Park, Ltd. (Metropolitan Life Ins. Co. v. Monroe Park, Ltd.),* 17 B.R. 934 (D. Del. 1982). Continental argues that movants may only seek adequate protection for the period after they have sought relief from the court. *In re Haiflich,* 63 B.R. 314, 316 (Bankr. N.D. Ind. 1986).

The court agrees with the Debtor that in the absence of controlling precedent the better view is that adequate protection may only be awarded from the date movants seek relief. *In re Best Products Co., Inc.* 138 B.R. 155 (Bankr. S.D.N.Y. 1992). In *Best Products* Chief Judge Lifland held that the motion date is the appropriate valuation date for collateral subject to the automatic stay. The secured creditor could only receive adequate protection to the extent the collateral declined in value after it filed its motion for adequate protection, rather than receiving compensation for all post-petition decline in value. *Id.* at 157.

In so ruling, Chief Judge Lifland relied on three main factors. First the language of section 363(e) provides that the court shall provide adequate protection "on request," implying that the onus is on the creditor to so move. *Id.* Second, the possible hardship to the debtor if a creditor waited until late in the bankruptcy proceedings to file its motion, subjecting the debtor to "sizeable 'makeup' payments." *Id.* (*quoting Ahlers v. Norwest Bank*, 794 F.2d 388, 395 n.6 (8th Cir. 1986) *rev'd on other grounds, Norwest Bank v. Ahlers*, 485 U.S. 197 (1988)). Finally, the adequate protection motion puts the debtor on notice that it "must decide what it should do with collateral. The debtor is given the option to surrender the property to the entity that has made the request, and avoid providing adequate protection, or provide adequate protection to such entity for the debtor's continued use of the collateral." *Id.* at 158.

There is a related approach, thoroughly discussed in *Ahlers* and still in use. Adequate protection is due only from the time "the creditor could have obtained possession and disposed of the property" but for the automatic stay. *In re Glinz*, 69 B.R. 916, 920 (Bankr. D.N.D. 1987) (applying *Ahlers*) . Accordingly, the collateral must be valued as of the date the secured creditor could sell it, which may not be the same date the creditor moved for adequate protection or relief from stay. *Ahlers v. Norwest Bank*, 794 F.2d at 397-8; *accord, In re Deico Elecs., Inc. (Paccom Leasing Corp. v. Deico Elecs., Inc.)* 139 B.R. 945, 947 (9th Cir. B.A.P. 1992) ("[A]dequate protection analysis requires the bankruptcy court to first determine when the creditor would have obtained its state law remedies had bankruptcy not intervened.") (not citing *Ahlers*).

Luckily the difference between these two views, if any (after all *Best Products* dealt with data processing equipment subject to immediate foreclosure rather than real estate), need not be resolved by this court. The collateral at issue is all aircraft and related equipment. If relief had been granted when the adequate protection or section 1110 motions were brought, the collateral would have been available almost

immediately for sale. Therefore the appropriate date for valuation is the date the adequate protection motion was filed.

In re Monroe Park does not mandate a different result. (*Metropolitan Life Ins. Co. v. Monroe Park*), 17 B.R. 934 (D. Del. 1982). In *Monroe Park* the District Court affirmed this court's granting of relief from stay on the grounds that the undersecured mortgagee's interest in an apartment building was inadequately protected due to accruing post-petition interest. *Id.* at 936. At the time the debtor-mortgagor filed bankruptcy, the mortgagee had already commenced foreclosure proceedings in Superior Court. The bankruptcy court's findings of fact and valuation dates were not disputed on appeal, so that issue was not before the District Court. *Id.* at 938. There is a statement that the secured creditor was entitled to adequate protection "for the interim period between filing of the petition and confirmation." *Id.* at 940. On the *Monroe Park* facts, that is not true after *Timbers:* an undersecured creditor whose collateral is not decreasing in value is not entitled to compensation for the delay in foreclosure (interest) due to the automatic stay. No doubt *Monroe Park* would have been decided differently today.

Finally, the court does not agree that adequate protection may only be sought in conjunction with a lift stay motion. While typically they are brought as alternatives, there is no such explicit requirement in the Code. In fact, the existence of section 363(e) would imply that adequate protection may be sought independently.

III. TESTIMONY AT TRIAL

Three valuation experts testified at the hearing. Continental presented the testimony of John Luth, its Vice President of Finance and Treasurer. First Fidelity and The Bank of New York both presented the testimony of Richard Wells, a certified aircraft appraiser for Avitas Aviation. Wilmington Trust relied on the testimony of Clive Medland of Simat, Helliesen & Eichner. Both Avitas and Simat Helliesen are companies in the business of appraising aircraft.

Luth testified first. The thrust of his testimony was that the aircraft market collapsed in the Fall of 1990 for a number of reasons and remained relatively static for the next twelve months. He spoke generally on national and international events which contributed to this decline, and he supported his analysis of the Stage 2 aircraft market with Avitas Blue Book values. (Most of the equipment in the collateral pool are Stage 2 aircraft.) Finally, he presented his valuations of the individual aircraft and engines prepared for Continental the first week of March 1991.

Luth attributed the collapse in the Stage 2 aircraft market to three major factors. First, the Iraqi invasion of Kuwait in August of 1990, which triggered increased fuel prices and decreased American tourism abroad. Second, the recession which had at least begun by the Summer of 1990 and contributed to decreased air travel. Third, the Stage 2 noise regulations, which were known to the industry as early as 1988 and saw actual enactment in October of 1990. 49 U.S.C.A. app. § 2157 (1991). This legislation called for the gradual phase-out of noisy Stage 2 aircraft by the year 2000. 56 Fed. Reg. 48628, 48659-60 (1991).

Luth supported his conclusions with the Avitas Blue Book values for Stage 2 aircraft. These guides are published twice a year in July and January, based on market data gathered the few months prior to publication. Therefore, the published values lag the market by two to three months. According to the Avitas Blue Books for July 1990 through July 1991, Stage 2 aircraft values generally dropped steadily from July 1990 through January of 1991 and then remained static through July of 1991.

Luth valued the collateral as of March 1990 (the discrete individual values presented at the hearing have been summed). BNY's collateral pool was valued at 49 million dollars, FFB's at 103 million, and WTC's at 52 million. These values were the result of communications with the marketplace by Luth and his staff: evaluations of aircraft

comparables, aircraft on the market, and aircraft coming off lease.

Very generally, the opposing experts agreed with Mr. Luth on the primary factors affecting the aircraft market, although in most instances they disagreed on the timing of the effect: whether it was sharp and immediate or gradual and delayed. For example, the now noise legislation which Luth saw as promoting a sharp drop in Stage 2 aircraft values immediately post-passage was seen as promoting a gradual decline in Stage 2 aircraft values by Wells because the older aircraft could be phased out over a period of ten years.

Mr. Wells testified that the aircraft had indeed been losing value prior to the petition date but that the decline continued post-petition. Wells valued BNY's collateral pool at 76.3 million as of the petition date and 57.8 as of the trial date: a loss of 18.5 million in nine months. Wells valued FFB's collateral pool at 194 million as of the petition date and 161 million in late August, a decline of 33 million in nine months.

Wells based his valuations on a combination of variously weighted factors: the Avitas Blue Books, analysis of the marketplace and comparables. It was elicited on cross examination that Wells' petition date valuations were identical to an average of the Blue Book values for January 1991 and July 1990, although he testified that he considered other factors rather than simply taking an average of the two Blue Book values.

Mr. Medland testified that the Stage 2 aircraft in WTC's collateral pool were worth approximately 82 million as of the petition date and 50 million eight months later: a loss of nearly 32 million dollars post petition. Medland's starting point for the valuation was a comparable from March 1990--eight months prior to the filing date. Medland reasoned that the December 1990 aircraft values had not declined greatly over the summer and that the March values held steady through the rest of 1990. Given the world events between March and December of 1990, the court finds this conclusion unrealistic and this transaction unreliable as a comparable. By

way of comparison, the July 1990 Avitas blue book values for 727-200 advanced aircraft are in the seven to eight million range, but drop by two or three million dollars by the next issue (January 1991).

In summary, the expert conclusions as to the collateral pool values varied widely. All three experts were credible, although it was obvious in each instance who they represented. Given the unresolvable conflict in values (and because it is impossible to absolutely discount any one expert's testimony), the court finds that the Blue Books are the most reliable in charting general market values for the period July 1990 through July 1991. (The Blue Book values for a particular model of aircraft were usually at least one million dollars more than the values assigned by Luth and three to four millions of dollars less than the values assigned by Wells and Medland.)

As mentioned, the Blue Books indicate a general decline in value from July 1990 through January 1991. At that point, the market values bottomed out and remained constant through July 1991. While the Blue Book aircraft values are higher than those ascribed by Luth, they still indicate that the Trustees were undersecured as of the Omnibus motion date (and most likely as of the December 1990 filing date because the Blue Book values lag the market place by several months). The Trustees are only entitled to adequate protection if their collateral declined in value after the adequate protection motion was filed. Therefore, the court need only determine if the collateral has actually decreased in value since the motion date. The court finds that the aircraft values have remained flat post January 1991, as indicated by the July 1991 Blue Book values. Therefore, Movants are not entitled to adequate protection based on decline in market value due to market conditions.

IV. CONCLUSION

An Order in accordance with this Memorandum Opinion is attached.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In the Matter of	:	
CONTINENTAL AIRLINES, INC., et al.,	:	Case Nos. 90-932 through 90-984
Debtors.	:	

ORDER

AND NOW, August 27, 1992, for the reasons stated in the attached Memorandum Opinion,

IT IS ORDERED that the request of The Bank of New York, Wilmington Trust Company and First Fidelity Bank for adequate protection is DENIED.

/s/ Helen S. Balick

JUDGE